Supreme Court, U.S.
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No. 91-1422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

S. PAUL HOBBS, AND DONNA M. HOBBS, his wife and
PHILLIP RAY HOBBS, AND DOROTHY V. HOBBS, his wife,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal agency, that does not have permitting authority under a federal statute, may use its own standards rather than the standards of the permitting authority and maintain an enforcement action against a citizen for injunctive relief and civil penalties of millions of dollars, when the federal agency with permitting authority under the statute using its standards declines to assert jurisdiction and require the citizen to have a permit.

2. Whether a citizen's property which does not actually abut on a navigable waterway and has no wetlands adjacent to bodies of open water are "waters of the United States" subject to regulation by the Corps of Engineers and the requirement of a Section 404, Clean Water Act permit before the land can be disturbed.

3. Whether the term "neighboring" contained in the regulatory definition of adjacent wetlands is unconstitutionally void for vagueness.

4. Whether constitutional due process and the Seventh Amendment require that a citizen be permitted to assert a good faith belief in the invalidity or inapplicability of an Administrative Order issued by a federal agency, as a disputed factual issue to the jury, during the liability phase of a trial to enforce penalties of $25,000 per day for each day of violation of that Order.

PARTIES

The defendants-appellants below were individuals, S. Paul Hobbs, Donna M. Hobbs, Phillip Ray Hobbs and Dorothy V. Hobbs. The plaintiff-appellee was the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners S. Paul Hobbs, Donna M. Hobbs, Phillip Ray Hobbs, and Dorothy V. Hobbs respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears at Appendix ("App.") 1a. The final order and judgment order of the District Court are unreported and appear at App. 16a, and App. 53a respectively. The findings of fact and conclusions of law of the District Court appear at App. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1991. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied on December 11, 1991. App. 95a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Fifth Amendment, Seventh Amendment and relevant provisions of the Clean Water Act of 1977, 33 U.S.C. §§ 1251, *et seq.* ("CWA") and implementing regulations promulgated by the United States Army Corps of Engineers ("Corps Regulations") and United States Environmental Protection Agency Regulations ("EPA Regulations") are reprinted at App. 134a.

STATEMENT OF THE CASE

For more than nine years before this case began, Petitioners Paul Hobbs and his father, Phil Hobbs ("Hobbs") had been converting their wooded, agriculturally zoned property in Gloucester County, Virginia, to agricultural fields under the direct supervision of the U.S. Department of Agriculture, Soil Conservation Service ("SCS"). The

SCS representatives reviewed federal wetland maps and made on site studies to satisfy their agency's requirement that wetlands did not exist. The SCS laid out the ditch system, established specifications and staked the ditches that the Hobbs were to dig. Joint Appendix filed in the Court of Appeals ("JA") 432-436. The SCS representatives inspected the work after it was done to ensure that it complied with their directions. JA 436. The ditches were improvements to existing ditches and new ditches both of which were connected to previously existing ditches, not on the Hobbs property, which ultimately empty into the Ware River after passing through other developed property and road culverts under Va. State Route 623.[1] JA 463. The Hobbs' property is located approximately ½ mile from the Ware River. JA 227. In 1980 Phil Hobbs, (JA 225) and in 1986 Paul Hobbs, (JA 224) entered into "Cooperator's Agreement" with the SCS.

In September, 1988 a Mr. Frazer of the Fish and Wildlife Service ("F&WS") came to the property and claimed Paul Hobbs "might be doing work in a non-tidal wetlands." JA 492. No other federal agency had ever made such a claim before. JA 491. Mr. Frazer arranged a site visit, the purpose of which, the Hobbs were told, was "to involve someone from the Corps of Engineers, the regulatory agency, to make a more definitive call over whether the activities and the site would be regulated under Section 404 of the Clean Water Act." JA 392. Mr. McGlaun of the Corps testified Mr. Frazer "[c]alled me and asked if I would accompany him to a site in the Ware Neck vicinity to determine whether or not an area that he felt was within our jurisdiction was, in fact, within our jurisdiction," and that when they arrived at the Hobbs' property, "[w]e walked a portion of the property to see what had been—what work had already been

[1] The District Court found that after chemical tests of the water in the ditches, "Those tests show a very high water quality currently coming off the property, a water quality that meets both the EPA and the State Water Control Board's drinking water standards." App. 26a.

performed and, to the best of our ability, make a jurisdictional determination as to whether or not the work was within the Corps of Engineers' jurisdiction." JA 440-441.

The site visit occurred on October 4, 1988. Paul Hobbs testified that when Mr. McGlaun left the property he told him ". . . that he didn't see where we had, you know, done anything wrong . . . and he would get back to us." JA 494-495. Mr. McGlaun never got back to the Hobbs JA 496, never told the Hobbs the Corps had jurisdiction JA 465, never told the Hobbs they needed a permit from the Corps JA 465, and never told Paul Hobbs to stop the ongoing work. JA 466. Mr. McGlaun testified that from the date of the site visit to the date of the Hobbs' trial he has never issued a Cease and Desist Order to the Hobbs, which the Corps Regulations, 33 C.F.R. § 326.3, require be issued when a violation exists. JA 464-465. App. 144a.

At Mr. Frazer's office immediately after the October 4, 1988 site visit Mr. McGlaun told Mr. Frazer ". . . that I felt like unless we could have a consensus of all sites meeting the multiparameter approach, it would be too vague and too gray and that we would not want to assert jurisdiction" (JA 450), and "[t]hat it would be difficult because it is not the type of area that the Corps normally likes to become involved in." JA 451. Mr. McGlaun specifically told Mr. Frazer that unless a wetland delineation was done using the Corps' Manual he would not take any action. JA 456-457. Mr. McGlaun reported the results of the October 4, 1988 site visit to his department head in the Norfolk District Corps, Mr. Poore, and to Ms. Steele, Mr. McGlaun's immediate superior and, ". . . told them that Gary Frazer was going to refer this to EPA if the Corps didn't assert jurisdiction, and Mr. Poore told me to go ahead and let Gary Frazer refer the property or the situation to EPA." JA 452.

Mr. McGlaun testified at trial that the Corps has never determined that the Hobbs' work was unauthorized. "I have not. I have never determined that that is an un-

authorized—or that is a 404 area." [2] JA 465. The Corps is the sole permitting agency under Section 404 of the CWA.[3] JA 342-343, 381, 392. To determine whether jurisdiction existed to require a Section 404, CWA permit in this case, the Norfolk District Corps required that the standards and procedures set out in the Corps' Wetlands Delineation Manual ("Corps Manual") be applied to a particular property to determine whether it met the regulatory definition of a wetland, 33 C.F.R. § 328.3(b). App. 145a; JA 454-457. The Corps would not accept wetland jurisdictional determinations using the EPA Wetlands Manual, Revised Interim Final Edition of April 1988 ("EPA Manual"). JA 456-457. After the October 4, 1988 site meeting Mr. Frazer submitted data to his superiors at F&WS reflecting that he claimed only 2 of 5 sites he examined on the Hobbs property were wetlands pursuant to the Corps' Manual, but that all 5 sites "would be wetlands under EPA methodology".[4] JA 159. After formal written requests from the EPA on November 17, 1988 (JA 157) and the F&WS on December 12, 1988 (JA 159) that the Corps assert CWA jurisdiction over the

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[2] During the Government's case the District Court pointed out this problem to the Government's Counsel. "So at the threshold level, before you can have a violation of Section 1311—and the Army Corps of Engineers is the only permitting authority under this statute. The EPA can't go out and determine whether to issue permits or not issue permits. The Army Corps of Engineers does that. Now, maybe your evidence is going to show they are willing to assume jurisdiction and require permits, but so far it doesn't, and in fact it looks like it may be to the contrary. So you have certainly got a problem in that regard on Count I. If your permitting authority isn't willing to take jurisdiction, it would be difficult to have a violation." Trial Transcript at 335-336.

[3] The Court of Appeals erroneously determined that the EPA has authority to issue Section 404 permits. App. 8a. Only the Secretary of the Army, by delegation to the Chief of Engineers and further to District Engineers, has authority to issue Section 404 permits. 33 U.S.C. § 1344(a) and (d). App. 139a.

[4] The Court of Appeals acknowledged that, "the EPA Manual does represent a significant change in the definition [of a wetland] and an expansion of jurisdiction." App. 10a.

Hobbs property and require the Hobbs to obtain a permit, the Corps did not do so.[5]

The EPA, with no prior notice or opportunity to be heard given to the Hobbs, issued a Findings of Violation and Order for Compliance to the Hobbs on March 23, 1989 (App. 118a.), which was amended on April 25, 1989 (App. 126a.) after the Hobbs asserted that their property was not adjacent to the Ware River (collectively, "EPA Orders"). Both of EPA's Orders alleged that *the Hobbs had violated Section 404 of the CWA by filling wetlands without a permit from the Corps.*[6] App. 124a. and 132a. In part, because the Hobbs had been told that the Corps was the agency that had jurisdiction and would say whether or not a permit was required, and because Mr. McGlaun of the Corps had been at the site on October 4, 1988 specifically to make a determination of jurisdiction, the Hobbs in a good faith belief that the EPA's Orders were in error did not comply, although Paul Hobbs did stop all work. JA 496-500. Phil Hobbs had not done any work on his property since the summer of 1985. JA 478-479.

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[5] The Court of Appeals' finding that ". . . nothing in the record suggests that the Corps actually refused to exert jurisdiction over the Hobbs' property through a wetlands determination" is inexplicable. App. 7-8a. In addition to Mr. McGlaun's site visit and discussions with his superiors, the formal request to assert jurisdiction from F&WS specifically stated F&WS "made wetland determinations" and enclosed "field forms . . . for both the Corps and [EPA] methodologies". JA 160. The formal request to assert jurisdiction from EPA specifically stated "one of our field biologists visited the site to verify the fact that the site was being converted from PFOIA forested wetlands into hayfields." JA 157.

[6] Compliance with the EPA's Orders required, among other affirmative acts, plugging the ditches and submission of a plan for restoring much of the property to the condition it was in prior to the work the Hobbs had performed over the previous 9 years under the SCS's supervision. The Court of Appeals held that the Government is not estopped under the facts of this case and that ruling has not been appealed. App. 13a.

Having no administrative remedy to assert their belief in the invalidity and inapplicability of the EPA Orders, and knowing their property was not adjacent to the Ware River or tributaries of the Ware River as alleged in the EPA Orders, the Hobbs filed a suit for Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202 in the District Court asserting jurisdiction pursuant to 28 U.S.C. § 1331. JA 19. The Hobbs obtained a Temporary Injunction preventing the Government from further enforcing the EPA Orders and allowing the Hobbs to continue to harvest their hay. JA 59. The Hobbs' Complaint was later dismissed for lack of subject matter jurisdiction and the Government's Counterclaim pursuant to section 309 (b) of the CWA, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331, 1345 and 1355, for civil penalties of potentially more than $66,975,000, was permitted to proceed at trial.[7] App. 102a. The trial was bifurcated into liability and penalty phases.

Mr. Frazer and representatives of the EPA performed further wetland studies using the EPA Manual adopted in April 1988 and a Federal Manual adopted in 1989 ("Federal Manual"). JA 402-403. No wetland studies were done using the standards of the Corps Manual. All wetland experts testified that application of the EPA Manual and the Federal Manual effective on March 20,

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[7] The actual total of civil penalties to which the Hobbs were exposed was clearly debilitating. From 1980 through February 4, 1987, each day discharged material remained on the ground was a separate violation subject to a $10,000 civil penalty, 33 U.S.C. § 1319(d). App. 139a. The CWA penalty provisions were increased to $25,000 per day after February 4, 1987. App. 138a. From 1980 through the District Court's judgment, the unpermitted discharge claim alone exposed the Hobbs' to the potential of $42,675,000 in civil penalties. In addition, failure to comply with the EPA Orders constituted a *separate per day violation* of $25,000 for each day the Hobbs did not comply. Because the Hobbs' Complaint for Declaratory Judgment which supported the Temporary Injunction was dismissed for lack of subject matter jurisdiction, the Hobbs were exposed to $12,150,000 each in additional civil penalties for failure to comply with EPA Orders. App. 10a.

1989, after all of Phil Hobbs' and much of Paul Hobbs' work had been completed, expanded the jurisdictional reach of Section 404 of the CWA because it allowed them to determine property to be a wetland using the Corps Regulatory definition 33 C.F.R 328.3(b), which they would not have been able to do, applying the standards of the Corps' Manual.[8] JA 373, 381-382, 390-391, 412-415, 463 516-517. In response to special interrogatories propounded by the District Court, the jury found that the Hobbs filled wetlands as defined by 33 C.F.R. § 328.3 (b). App. 97a. and 100a.

All witnesses including the Government's own photo interpreter testified at trial that the waterways on the Hobbs property were mandug drainage ditches and that they were non-tidal. JA 363-368. Paul Hobbs testified that they were mandug, non-tidal drainage ditches dug on dry land. JA 499. An EPA expert witness marked the point on an Exhibit where in his opinion tributaries to the Ware River stopped and mandug drainage ditches began. This point was well short of the Hobbs property lines. JA 358-363. Notwithstanding that prior Corps Regulations, in effect when Phil Hobbs did the work on his property (App. 141a.) state that mandug non-tidal drainage ditches are not tributaries and the Corps regulations effective since January 12, 1987, in effect when Paul Hobbs did the work on his property (App. 143a.) state in the Preamble that the Corps did not normally consider mandug, non-tidal drainage ditches dug on dry land to be "waters of the United States" defined at 33 C.F.R. § 328.3(a)(1-7) (App. 144a.) the District Court refused to so instruct the jury. JA 232. The District Court also refused to instruct the jury that the use of the word "neighboring" in the regulatory definition of adjacent (wetlands), 33 CF.R. § 328.3(c) (App. 145a.) must be given the same meaning as "contiguous" and "bordering" or be unconstitutionally "void for vagueness".

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[8] The Court of Appeals agreed, ". . . the EPA Manual does represent a significant change in the definition and an expansion of jurisdiction." App. 10a.

Finally the District Court refused to instruct the jury that the Hobbs had the right to rely upon their good faith belief that the EPA Orders were incorrect or inapplicable as an absolute defense to Count II of the Complaint which sought civil penalties of $25,000 per day for each day the Hobbs did not comply. JA 236; App. 114a. In response to special interrogatories the jury found that the Hobbs violated the EPA Orders. App. 99a. and 101a. Because the Hobbs conceded that they did not have a permit, the District Court ruled that no issue of fact was presented and refused to allow the jury to determine if the Hobbs discharged, without a permit required by the Corps. App. 62a-63a.

At the conclusion of the penalty phase of the trial Phil Hobbs was fined $100 and Paul Hobbs $200. App. 19a. Twenty five acres of Paul Hobbs' land must be allowed to revegetate naturally (App. 18a.) and the Hobbs must implement a restoration plan which will cost Phil Hobbs $105,400 and Paul Hobbs $128,000 before they can change the agricultural use of the land to another agricultural use. App. 17a and 31a.

The Hobbs appealed. The Court of Appeals affirmed, finding no merit in the Hobbs' argument ". . . that because the Corps did not find that the Hobbs were discharging pollutants into wetlands nor requiring them to secure a permit, the EPA has nothing to enforce." App. 7a. The Court of Appeals held that "the discharge itself is illegal." App. 8a. The Court of Appeals expanded this Court's holding in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("Riverside Bayview Homes") to include wetlands on the Hobbs property which do not "actually abut on a navigable waterway", 474 U.S. at 135, and included "wetlands that are not adjacent to bodies of open water." 474 U.S. 132 n.8 App. 11a. The Court of Appeals rejected the Hobbs' claim that the term "neighboring" found in the regulatory definition of "adjacent", 33 C.F.R. § 328.3(c), is void for vagueness. App. 11a. The Court of Appeals also rejected the Hobbs claim

that constitutionally mandated due process required that they be permitted to assert their good faith belief defense to the EPA's Orders, as a factually disputed issue to the jury during the liability phase of the trial, holding that the Hobbs are afforded constitutionally adequate process because the District Court considered these claims during the penalty phase of the trial. App. 12-13a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals is in conflict with the decisions of other Circuits which hold that under Section 404 of the CWA, the Corps' decision to assert jurisdiction and require a permit is discretionary and until the Corps has determined whether or not it has jurisdiction and a permit is required, the Courts have no jurisdiction to interfere. The Court of Appeals has permitted a lay jury to make a wetland determination using standards which the permitting agency, the Corps, refuses to recognize, which .e other Circuits have held not even the District Court has jurisdiction to make. This case demonstrates faulty statutory construction of Section 404 of the CWA and the unwarranted expansion by the Court of Appeals of this Court's decision in *Riverside Bayview Homes, supra*, expanding federal regulatory jurisdiction over as much as 4,400,000 acres of private wetland property converted, mostly for agricultural purposes, nationwide since 1980 into "waters of the United States".[9] This decision subjects the owners of these millions of acres of expanded "waters of the United States" to retroactive enforcement actions by the EPA seeking millions of dollars in civil penalties in each case. The future implications of this case upon private property owners whose property is not "bordering" or "contiguous" to any "water of the United States" are dependent only upon the subjective standards applied by a jury that the wetlands are "neigh-

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[9] *See*, Tiner, Ralph W., Jr., *Mid-Atlantic Wetlands: A Disappearing National Treasure*, June 1987, a cooperative publication of the U.S. Fish & Wildlife Service and the U.S. Environmental Protection Agency; Scodari, Paul F., 1990 *Wetlands Protection: The Role of Economics*, Env. Law Institute, Washington, DC.

boring", or as the Court of Appeals believes is supported by this Court's holding in *Riverside Bayview Homes, supra*, "in reasonable proximity to other waters of the United States." These private property owners and the federal agencies which seek to regulate their private property as "waters of the United States" pursuant to Section 404 of the CWA are in need of this Court's guidance, by answering the question left unanswered in *Riverside Bayview Homes, supra.*[10] Finally, the denial of the constitutional right of a citizen to assert a good faith belief in the invalidity or inapplicability of an Administrative Order issued by a federal agency as a complete defense to liability for civil penalties of $25,000 each day the Order is not complied with, where no remedy exists to contest the Order's validity, save-noncompliance, raises a substantial constitutional issue. This Court should grant certiorari to resolve these issues.

I. A NON-PERMITTING FEDERAL AGENCY, MAY NOT BRING AN ENFORCEMENT ACTION USING ITS OWN AND DIFFERENT STANDARDS, WHEN THE PERMITTING FEDERAL AGENCY DECLINES TO ASSERT JURISDICTION AND REQUIRE A PERMIT USING ITS OWN STANDARDS

The Court of Appeals is incorrect as a matter of law in holding that both the Corps and EPA have authority to issue permits under Section 404 of the CWA.[11] The EPA in its own regulations, 40 C.F.R. § 230.3(n) (1988) (App. 146a.), acknowledges that the Corps is the sole permitting authority under Section 404 of the CWA. While the Court of Appeals is correct that both the Corps

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[10] "We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into *wetlands that are not adjacent to bodies of open water*, see 33 C.F.R. §§ 323.2(a)(2) and (3) 1985 and we do not express any opinion on that question." 474 U.S. at 132 n.8 (emphasis added).

[11] *See*, App. 8a. ("*EPA would not be much of an authority if it could* make wetlands determinations, *issue permits*, but could not enforce the very rule for which those permits provide the exception.") (emphasis added).

and EPA have enforcement authority under the CWA, Congress did not grant permitting authority to the EPA under Section 404 of the CWA.[12] App. 139a.

Congress, in Section 404 of the CWA, explicitly and without equivocation gave authority to determine jurisdiction and the requirement of a permit *solely to the Secretary, by delegation here to the Norfolk District Engineer, and no other federal agency.* App. 139a. Nothing in Section 404 of the CWA gives the Administrator the right to make "jurisdictional determinations" or substitute his judgment of when a Section 404(a), CWA permit is required. Until the Corps has exercised its discretionary authority pursuant to 33 U.S.C. § 1344(a), the question of whether or not "the discharge of any pollutant" is "in compliance with Section 404" under 33 U.S.C. § 1311(a) is incapable of determination.

The Administrator's only statutory jurisdictional role in the Section 404 permitting program is Section 404(c) "veto" authority over permitting decisions made by the Secretary that have specified impacts, none of which are applicable here, 33 U.S.C. § 1344(c), and the development, in conjunction with the Secretary, of guidelines for the Secretary's permit decisions. 33 U.S.C. § 1344(b). App. 139a. These guidelines are not issued on a case by case basis as each permit application or decision is made, rather they are applicable to all permit applications submitted to the Corps. *See*, 40 C.F.R. §§ 230.1-230.80.

Because the evidence was uncontradiced that the Corps has never determined that the Hobbs required a Section 404 permit for the activities the EPA alleged in this case were "not in compliance with Section 404" of the CWA, the Hobbs moved for a Directed Verdict at the close of the Government's case and again at the conclusion of all

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[12] Section 404 of the CWA is totally distinguished from other permit programs of the CWA which the EPA administers as the permit authority. *See*, 33 U.S.C. § 1342 (National Pollutant Discharge Elimination System, NPDES).

evidence.[13] No evidence was presented by the Government that the Hobbs committed the Section 301(a) violation with which they were charged by the EPA. The Government's own witnesses conceded that if the Corps did not assert Section 404, CWA jurisdiction over property or require a permit that there would be no violation of the CWA for discharging dredged or fill material onto that property. JA 336-337, 384-387. Both the District Court (App. 59a.) and the Court of Appeals (App. 8a.) held that because the Hobbs did not have a permit, even if the permitting agency, the Corps, did not require one, an enforcement action alleging an unpermitted discharge by the EPA is nevertheless authorized.[14]

The Secretary's exercise of, or refusal to exercise, his discretionary authority pursuant to Section 404 of the CWA is only subject to arbitrary and capricious judicial review pursuant to the citizens suit provision of the CWA, 33 U.S.C. § 1365, and the APA, 5 U.S.C. 551 *et seq. See e.g, Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 902 n.11 (5th Cir. 1983) ("We have held that enforcement of the CWA is not a 'mandatory duty.'") (citation omitted)[15] *See also, Heckler v.*

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[13] Mr. McGlaun of the Corps testified, "I have not. I have never determined that that is an unauthorized—or that is a 404 area." JA 465.

[14] The District Court stated ". . . but even if they had applied, for the sake of argument, for a permit and the Army Corps of Engineers had made a determination that a permit wasn't necessary because there weren't jurisdictional wetlands involved I'm of the opinion that the EPA could still go forward with an enforcement action." App. 90a.

[15] *See, Orleans Audubon Soc.* v. *Lee*, 742 F.2d 901, 904 (5th Cir. 1984) ("*Orleans* concedes that we normally must review decisions of the Corps under the arbitrary and capricious standard and it concedes that decisions not to require permits for actions by private developers, such as those at issue here, are usually considered to be discretionary."). *See, also, Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers*, 700 F. Supp. 1549, 1550-1551 (N.D.Cal. 1988) ("When it learned from the Perkins deposition that the Corps had disclaimed jurisdiction on November 7, the EPA

Chaney, 470 U.S. 821 (1985) (Absent statutory method of review, agency's decision not to take enforcement action presumed immune from review).

The split in the Circuit decisions presented in the instant case is unusual in that it occurs *sub silentio*. No other Circuit has found a Section 301(a), CWA violation, because of a discharge *without a Section 404 permit*, without the permitting authority, the Corps, having asserted the requirement for a permit.[16] Even in those cases where a wetland determination made by the Corps has been determined to be deficient, other Circuits limit the District Court's jurisdiction to remand to the Corps for a proper wetland determination.[17]

In the instant case the Court of Appeals has held that when the Corps did not make a detailed wetland determination (App. 8a.), a lay jury may do so based upon evidence presented by non-permitting authorities using an EPA Manual, which did not exist until 8 years after the Hobbs began work, which the Corps did not recognize, and the 1989 Federal Manual which did not exist when the Hobbs did any of the work.[18] The Hobbs jury was permitted to disregard the Corps' Manual, which the Corps required be used (JA 456-457), use whatever evidence it found appropriate from non-Corps expert

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voluntarily withdrew its January 12 Findings and Order, declaring them null and void."); *N.W.F.* v. *Laubscher*, 662 F. Supp. 548 (S.D. Tex. 1987) (citizens suit, holding enforcement decision is discretionary).

[16] *See, e.g., U.S.* v. *Marathon Development Corp.*, 867 F.2d 96, 97 (1st Cir. 1989); *Avoyelles, supra*, 715 F.2d at 901; *Hoffman Group, Inc.* v. *U.S.E.P.A.*, 902 F.2d 567, 568 (7th Cir. 1990); *U.S.* v. *Lambert*, 695 F.2d 536, 539 (11th Cir. 1983).

[17] *See*, footnote 19 *infra*.

[18] The jury found that Paul Hobbs did not discharge a pollutant into wetlands in 1989. App. 98a and Phil Hobbs had not discharged a pollutant into wetlands since 1985. App. 101a.

witnesses who used the standards of the EPA Manual and the 1989 Federal Manual and instructed by the District Court to find whether or not wetlands existed on the Hobbs property by applying the Corps regulatory definition of a wetland, 33 C.F.R. § 328.3(b). App. 144a. Thus, the Court of Appeals in this case has split with the other Circuits by sanctioning a lay jury's "de novo wetland determination", which all other Circuit Courts have, until the instant case, held not even a District Court has jurisdiction to make.[19]

In the instant case the Court of Appeals held that the permitting authority's requirement that a permit is necessary is irrelevant: "[u]nder 33 U.S.C. § 1311(a) the discharge of a pollutant is illegal 'except' as in compliance with sections authorizing permits . . . thus the discharge itself is illegal." App. 8a. In *Orleans Audubon Soc.*, *supra* at n.15, the landowner did not have a Section 404, CWA permit because the District Engineer had determined that no permit was required. Under circumstances similar to the Corps reliance upon its field scientist, Mr. McGlaun, in the instant case, the Fifth Circuit refused to find a District Engineer's decision not to require a permit to be arbitrary and capricious under the citizens

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[19] *Avoyelles*, 715 F.2d at 906 ("The wetlands determination is precisely the type of agency decision that is normally subject to limited judicial review . . . De novo review would permit the courts to intrude into an area in which they have no particular competence, and the presentation of the scientific evidence at both the administrative and judicial levels of the proceedings would result in inefficiencies and delays where they are most harmful.") and *Id.* at 903 n.14 ("The private defendants now concede that the Court below was without power to substitute its own wetland determination for that made by the agency. The role of the Court ended upon a finding that the jurisdictional determination made by the agency was not proved. Remand was the only appropriate judicial action."); *Orleans*, 742 F.2d at 907 ("On the other hand, if the decision represents a valid exercise of the Corps' decision-making powers, then this Court should not interfere with the Corps' judgment. *Overton Park*, 401 U.S. at 416, 91 S.Ct. at 824.").

suit provision of the CWA and the APA.[20] In the instant case the Court of Appeals has held that when the field scientists of the F&WS and EPA disagree with the Corps and its field scientist, the property owner can be the recipient of an Administrative Order and a subsequent enforcement action for millions of dollars in civil penalties, despite the fact that the Corps has *never* asserted the requirement for a Section 404 permit.

The Court of Appeals is simply wrong in stating, "[m]oreover, nothing in the record suggests that the Corps actually refused to exert jurisdiction over the Hobbses property through a wetlands determination." App. 8a. After being specifically requested by formal written requests from the EPA on November 17, 1988 (JA 157) and the F&WS on December 12, 1988 (JA 159) to assert jurisdiction and require the Hobbs to obtain a permit, the Corps declined to do so. These formal requests to assert jurisdiction over the Hobbs property and require a permit contained Wetland Determination Data Sheets applying both the EPA's and the Corps' standards for determining jurisdiction, and referenced those agencies' representatives as having visited the property and determined it to be wetlands. *Id.* The Corps' enforcement officials testified that the Corps did not assert jurisdiction over the Hobbs property and require a permit after these formal requests, and that both requests were received after the Corps' field investigator had made his investigation of the Hobbs property on October 4, 1988 *specifically* for the purpose of determining

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[20] *Orleans*, 742 F.2d at 911 ("Relying on this report, and having no concrete information which would indicate that the field inspector was in error, Colonel Sands agreed that the Corps had no jurisdiction under section 404 to require C.I.T. to obtain a permit for the culvert installation. His reliance on this report appears to have been in good faith, and we find no basis for holding that Colonel Sands decision was arbitrary or capricious. Even assuming that the report was erroneous, we cannot find in the record before us any indication that Colonel Sands' reliance upon the findings of the field investigator was so unreasonable as to indicate that the Corps' handling of this matter was actionable under the APA.").

if the Corps had jurisdiction and a permit would be required.[21] JA 389, 940, 440-441, 465.

The injustice in this case is readily apparent. The F&WS and EPA, dissatisfied with the Corps' decision not to assert Section 404, CWA jurisdiction over the Hobbs property and require a permit, issued the EPA Orders and subsequently filed this enforcement action seeking what could have been more than $66,975,000 in civil penalties against the Hobbs.[22] Although the United States

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[21] The Hobbs concede that the Corps never issued a formal letter to the EPA and F&WS stating that the Corps refused to assert jurisdiction. However, the lack of a formal response of any kind was not relevant to the Court of Appeals' determination. The Court of Appeals held that because the Hobbs did not have a permit, irrespective of the reason, the Hobbs violated the CWA. App. 8a. Even if the Corps had issued a formal letter that there was no CWA jurisdiction and no permit was required, the Hobbs would not have had a permit and under the Court of Appeals' decision would have violated the law. *Id.*

[22] The Court of Appeals relied upon *Avoyelles* as authority for this transfer of a permit program entrusted by Congress to the Corps under 33 U.S.C. § 1344(a) to the EPA. However, the Court of Appeals failed to appreciate that, unlike the instant case, where the Corps has never asserted Section 404 authority and the requirement for a permit and so notified the property owner through a cease and desist order, the Corps did in *Avoyelles*. *See, supra* at n.16. Nor did the Court of Appeals give any weight to the differing jurisdictional results obtained by applying the Corps' Manual, the EPA Manual and 1989 Federal Manual. *Compare Avoyelles* at 911 n.27 ("Heightened deference is due an agency' interpretation of "its own" regulations. Although *here it was the EPA that applied the Corps' definition in making the final wetlands determination*, we see no reason to lessen our deference in this case. *The methodology was developed through consultations between the Corps and EPA*. Further, the EPA subsequently added the same definition to its own regulations. 40 C.F.R. §§ 230.3(t), 230.41(a)(1) (1982). *On appeal both agencies have offered the same interpretation of "their own regulations."*) (emphasis added). The Court of Appeals in the instant case found unimportant the lack of evidence that any "discharge" occurred in a "wetland" as determined by the Corps' Manual, and that the Corps did not assert at trial a permit was required. Undaunted, the EPA proceeded on its own standards, not the Corps, which the Court of Appeals concedes, "does represent a significant

was the named Plaintiff it was the EPA and not the Corps that instituted this enforcement action against the Hobbs.[23] In Mr. McGlaun's 13 years with the Corps, it is the Corps and not the EPA that makes these determinations.[24]

The Court of Appeals decision in this case is likely to be recurring because it sanctions Section 404, CWA enforcement actions by the EPA against the owners of millions of acres of land throughout the United States, converted to other uses since 1980, irrespective of the Corps' position, either expressly or through application of its standards, that jurisdiction did not exist and a permit was not required. The EPA now has judicial authority to apply its jurisdictional standards rather than the jurisdictional standards established by the permitting authority authorized by Congress. Even in those cases where the Corps has determined that no jurisdiction existed and a permit was not required, EPA Administrative Orders and enforcement actions have now been judicially sanctioned, with the only issue necessary to imposition of civil and criminal penalties being *did the property owner have a permit.* The only means by which a property owner can insulate himself from an EPA Administrative Order which requires the restoration of nine years of work or face the potential of ruinous civil penalties is by *actually having a permit*, even if nine years ago

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change in the definition [of a wetland] and an expansion of jurisdiction." App. 10a.

[23] Mr. Carson: Well, the Corps isn't bringing this case, Your Honor. He is a Corps employee.

The Court: Who is bringing it?

Mr. Carson: The EPA.

The Court: I thought it was the United States that was the named Plaintiff.

Mr. Carson: Well, that's true, Your Honor. JA 480.

[24] The Court: But basically, in your experience then, it has been the Corps who has been making these field inspections and determinations in this area.

The Witness: Yes, ma'am, since we are the permitting authority. JA 457-458.

the Corps said no jurisdiction existed and a permit was not required.

II. PRIVATE PROPERTY WHICH DOES NOT ACTUALLY ABUT ON OR BORDER A "WATER OF THE UNITED STATES" IS NOT SUBJECT TO THE REQUIREMENTS OF A SECTION 404, CWA PERMIT BEFORE THE LAND MAY BE DISTURBED

At trial, the Hobbs moved for a directed verdict because the evidence failed to establish jurisdiction, i.e., that wetlands, even if they existed, were adjacent to mandug, non-tidal drainage ditches dug on dry land and therefore were not wetlands adjacent, 33 C.F.R. § 328.3 (a)(7), to other "waters of the United States" as defined by 33 C.F.R. § 328.3(a)(1-6).[25] When this motion was denied, the Hobbs proffered a Jury Instruction requesting that the District Court instruct the jury that, from July 19, 1977 through July 22, 1982, the Corps explicitly excluded "man-made, non-tidal drainage and irrigation ditches excavated on dry land" from the definition of tributaries contained within the jurisdictional definitions of "waters of the United States." App. 141a. The Hobbs further requested that the District Court instruct the jury that the Corps regulations effective January 12, 1987, through the time of trial, explicitly stated in the Preamble that, "We generally do not consider the following waters to be 'waters of the United States': (a) non-

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[25] Defining the terms "navigable waters of the United States" and "waters of the United States" is synonymous with jurisdiction. If the property is not a "water of the United States" there is no jurisdiction pursuant to Section 404 of the Clean Water Act to require a permit. 33 C.F.R. 328.3(a)(1-7). *See, Riverside Bayview Homes*, 474 U.S. at 132 ("In determining the limits of *its* power to regulate under the [Clean Water] Act, the Corps must necessarily choose some point at which water ends and land begins.") The District Court noted the importance of this jurisdictional requirement, "On the other hand, in this case *the Court wouldn't have jurisdiction over these wetlands if they weren't adjacent to the Ware River or one of its tributaries*, so the Court has to take that into consideration." App. 29a. (emphasis added).

tidal drainage and irrigation ditches excavated on dry land. . ." App. 143a. JA 232. The District Court refused to so instruct the jury.

The Court of Appeals and the District Court were required, but refused, to give deference to the interpretation of the statute given by the agency administering it.[26] None of the Corps' definitions of "waters of United States", which wetlands must be adjacent to, include non-tidal drainage ditches. *See*, 33 C.F.R. § 328.3(a)(1-6) App. 144a. The lack of inclusion of non-tidal drainage ditches in the Corps definitions of "waters of the United States", and its regulatory exclusion of such drainage ditches as "waters of the United States" in the Preamble, demonstrate that the Corps *did not* prior to 1982, and does not now, consider drainage ditches to be bodies of open water or "waters of the United States" over which the Corps asserts jurisdiction under the CWA. *See*, 33 C.F.R. § 323.2(a) (1977). App. 142a.

The Hobbs do not dispute that their drainage ditches are hydrologically connected to the Ware River, as the Court of Appeals notes. App. 11a. Common sense compels recognition of the fact that *all drainage ditches* throughout the United States ultimately form a hydrological connection at some point to a water body which is pursuant to the Corps Regulations a "water of the United States". The Court of Appeals' reliance upon a hydrological connection as sufficient to bring wetlands adjacent to drainage ditches into regulation as "adjacent within the meaning of the statute" (App. 10a.) disregards the Corps' interpretation of the statute, which the Court of Appeals was required to grant great deference and expressly violates this Court's decision in *Riverside Bayview Homes*, *supra* that, ". . . the Corps must neces-

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[26] *See, Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) ("When faced with the problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *Riverside Bayview Homes*, 474 U.S. at 131 (according deference to the Corps' interpretation of Section 404 of the CWA.)

sarily choose some point at which water ends and land begins." 470 U.S. 132.[27] Rather than deferring to the Corps' interpretation of the statute, the Court of Appeals has substituted its judgment for the Corps.[28]

The Court of Appeals ignored that under this Court's holding in *Riverside Bayview Homes, supra* wetlands adjacent to drainage ditches would not be subject to regulation, *if the Corps itself*, excludes drainage ditches from its definition of waters of the United States.[29] This Court emphasized that its holding in *Riverside Bayview Homes, supra* was limited to those wetlands adjacent, i.e., which "actually abuts on a navigable waterway" which are bodies of open water.[30]

This Court should grant this Petition to answer the uncertainty left by *Riverside Bayview Homes Inc., supra,*

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[27] The Court of Appeals' reference to "adjacent" as "the express language of the statute" is incorrect. App. 11a. The CWA does not contain a definition of adjacent. This definition is contained in the Corps Regulations at 33 C.F.R. § 328.3(c). App. 145a. The same definition is found in the EPA's Regulations at 40 C.F.R. § 230.3(b). App. 146a.

[28] Relying on dicta in *Riverside Bayview Homes, supra* the Court of Appeals determined that ". . . the landward limit of Federal jurisdiction under Section 404 *must include any adjacent wetlands that* form the border or *are in reasonable proximity to other waters of the United States* as these wetlands are part of this aquatic system" to support its refusal to defer to the Corps' Regulations defining the extent of its jurisdiction under Section 404 of the CWA. App. 11a. (emphasis added)

[29] "Again, *we cannot say that the Corps' judgment on these matters is unreasonable*, and we therefore conclude that *a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway*, respondent was required to have a permit in this case." 437 U.S. 135. (emphasis added).

[30] "We are not called upon to address the question of the authority of the Corps to regulate discharge of fill material into *wetlands that are not adjacent to bodies of open water*, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985) and we do not express any opinion on that question." 474 U.S. at 132 n.8 (emphasis added).

which is likely to be recurring and define for the regulatory agencies and the regulated community how far landward the private property of citizens, "adjacent" to drainage ditches, may be regulated under Section 404 of the CWA, as "waters of the United States".

III. THE REGULATORY DEFINITION OF "ADJACENT" WETLANDS WHICH CONTAINS THE SUBJECTIVE STANDARD OF "NEIGHBORING" IS VOID FOR VAGUENESS

Central to this enforcement action seeking civil penalties which could have exceeded $66,975,000 was the Hobbs defense that their property was not adjacent to the Ware River or one of its tributaries. As the trial evidence conclusively demonstrated the Hobbs property was not "contiguous" or "bordering" to the Ware River or one of its tributaries. It is undisputed that the Hobbs property was connected hydrologically and could be "neighboring" depending upon how such a subjective standard was applied.[31] The Hobbs objected to the District Court's instruction of "adjacent" without the further instruction that the term "neighboring" as used in the Corps definition of "adjacent", 33 C.F.R. § 328.3(c), is to be given the same meaning or a meaning consistent with the terms "bordering" and "contiguous". The District Court's instruction allowed the Jury to determine that "adjacent" *could mean any physical distance* the jury determined to be "neighboring" to a "water of the United States". As instructed, the jury was permitted to render a standardless verdict on the factual issue of whether any of the Hobbs property was "adjacent" to a "water of the United States" and therefore itself a "water of the United States". 33 C.F.R. § 328.3(a)(7).[32] In affirming, the

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[31] Neither the definition of "adjacent" in the Corps' Regulations, 33 C.F.R. 328.3(c) (App. 145a.) or the EPA Regulations, 40 C.F.R. § 230.3(b) (App. 146a.) which are identical contain any provision that wetlands are adjacent based on a hydrological connection.

[32] Contrary to the Court of Appeals' decision such a geographically standardless jurisdictional reach has never been approved by this Court. *See, Riverside Bayview Homes*, 474 U.S. at 135 ("Be-

Court of Appeals relied upon dicta of this Court in *Riverside Bayview Homes*, *supra* that, ". . . the landward limit of Federal jurisdiction under Section 404 *must include any adjacent wetlands that* form the border or *are in reasonable proximity to other waters* of the United States, as these wetlands are part of this aquatic system. 424 U.S. at 133-134, quoting 42 Fed. Reg. 37,128 (1977) (emphasis added)." App. 11a. The Hobbs seek this Court's clarification that it never intended to approve a literal interpretation of such a subjective standard as "reasonable proximity" when instructing any jury as to the law they are required to apply.

The Hobbs could not determine in advance whether their property was "neighboring" or in "reasonable proximity" to any "water of the United States" so as to subject them to a CWA enforcement action for civil penalties exceeding $66,975,000 for work they had done over a period of nine years. The Hobbs did know that their property was not "contiguous" or "bordering" on the Ware River or its tributaries. It was precisely because the EPA's first Order claimed the Hobbs property was adjacent to the Ware River, (App. 123a.) that after being advised by the Hobbs that their property was not adjacent to the Ware River, the EPA issued the Amended Order claiming that the Hobbs property was adjacent to tributaries of the Ware River. App. 131a.

Refusal to instruct the jury that it must construe the list of definitional terms in a related fashion violated the "familiar principa[l] that 'words grouped in a list should be given related meaning' . . ." as recently instructed by this Court in *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989). Constitutional due process requires that Congress legislate in terms which will inform a citizen of what conduct is required. *See, Connally* v. *General Construction Co.*, 269 U.S. 385 (1925). Where Congress has

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cause respondent's property is part of *a wetland that actually abuts on a navigable waterway*, respondent was required to have a permit in this case.") (footnote omitted) (emphasis added).

delegated to a federal administrative agency authority to define regulatory terms required by the statute, as it has in the CWA, the constitutional due process sufficiency of the notice provided by the statute necessarily depends upon the clarity of the regulation. *United States* v. *Mersky*, 361 U.S. 431, 441 (1960) (". . . businessmen must not be left to guess the meaning of regulations."); *U.S.* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963) (statute "*[m]ust be sufficiently focused to forewarn of both its reach and coverage*".) (emphasis added).[33]

Any argument that this is a "civil" case not subject to the constitutional prohibition against vague legislation must fail.[34] Whether the Government seeks a "civil" penalty, 33 U.S.C. § 1319(d), or criminal "prosecution", 33 U.S.C. § 1319(c), under the CWA the due process concerns are exactly the same, as the factual predicate for jurisdiction is identical, i.e. whether "wetlands" are "ad-

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[33] "The constitutional due process doctrine of void for vagueness is concerned not only with protection of citizens, but equally with preventing arbitrary, discriminatory enforcement and providing clear standards for those charged with enforcing the statute. The doctrine incorporates *notions of fair notice or warning.* Moreover, *it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'* . . . Statutory language of such a standardless sweep allows policemen, prosecutors, *and juries* to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith* v. *Goguen*, 415 U.S. 566, 572-575 (1974) (citations omitted) (emphasis added).

[34] By imposing civil, criminal, and administrative penalties for violation of its prohibitions the CWA is clearly penal legislation. *See e.g., Huntington* v. *Attrill*, 146 U.S. 657, 666 (1892) ("In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, *whether corporal or pecuniary*, imposed or enforced by the State, for a crime or offense against its laws.") (emphasis added) (footnotes omitted).

jacent" (i.e., "neighboring") to "waters of the United States".[35]

Only by the jury's subjective application of the term "neighboring" contained in the District Court's instruction, for which the Hobbs were not forewarned, could the Hobbs property fall within the "reach and coverage" of Section 404 of the CWA and subject them to the potential for civil penalties in this enforcement action.

IV. DUE PROCESS AND THE SEVENTH AMENDMENT REQUIRE THAT A CITIZEN BE PERMITTED TO ASSERT A GOOD FAITH BELIEF THAT A FEDERAL AGENCY'S ADMINISTRATIVE ORDER IS INVALID OR INAPPLICABLE, AS A DISPUTED FACTUAL ISSUE FOR THE JURY TO DECIDE, DURING THE LIABILITY PHASE OF AN ENFORCEMENT ACTION SEEKING CIVIL PENALTIES FOR VIOLATION OF THAT ORDER

At the liability phase of the trial the District Court ruled that the Hobbs would be "strictly liable" if they failed to comply with the EPA's Orders threatening civil penalties of $25,00.00 per day *for the separate and distinct offense of failure to comply, if the Hobbs were found by the jury to have filled wetlands*, because the District Court held that the CWA is a "strict liability statute." JA 309, App. 71a. Notwithstanding that the District Court agreed that the Hobbs failure to comply with the EPA's Orders was a fact issue to be submitted to the jury, (App. 99a; 101a.), the District Court refused to

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[35] *See, Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1953) ("It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. *There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.* If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, *but it would do violence to the well-established principle that penal statutes are to be strictly construed.*") (emphasis added).

allow the Hobbs to present evidence and instruct the jury as requested, that the Hobbs were entitled to assert a good faith belief in the invalidity or inapplicability of EPA Orders served upon them as a *complete defense, irrespective of whether it was ultimately determined that the Hobbs had violated the CWA.* JA 236. App. 71a. The Court of Appeals affirmed the District Court's application of "strict liability." App. 8a.

The Hobbs were entitled to submit this defense, which of necessity, involves issues of fact, to the jury during the liability phase of the trial. This Court specifically held in *Tull* v. *U.S.*, 481 U.S. 412, 425 (1987) (that ". . . the petitioner has a constitutional right to a jury trial to determine his liability on the legal claims." The Court of Appeals ignored this Court's holding in *Tull, supra.*[36]

Assuming, without conceding, that the Court of Appeals is correct ". . . a penalty in some form is mandated. Liability under the Clean Water Act is a form of strict liability," (App. 12a.) it does not necessarily follow that failure to comply with the EPA Orders resulted in strict liability. The violation of Section 404 of the CWA is predicated upon a discharge without a permit, if a permit is required. The EPA Orders were issued in March and April, 1989, and ordered the Hobbs to "Refrain from *all further unauthorized discharge* of dredged or fill material into wetlands or waters at the Respondents' properties. . . ." App. 124 and 132a (emphasis added) The Jury found that Phil Hobbs did not discharge a pollutant

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[36] The Court of Appeals either misunderstood the Hobbs due process argument or believed that due process is satisfied if received in the imposition of a remedy after the jury's determination of liability. "The Hobbs, therefore conclude that the lack of due process protection prior to the imposition of liability for civil remedies violates their due process rights. This contention is without merit. The administrative orders do not in themselves impose penalties. Instead pursuant to CWA § 309(d), the penalties were imposed by the district court following a jury determination that the Hobbses violated the CWA." App. 12a. The Court of Appeals apparently failed to appreciate that violation of the EPA Orders was a separate and distinct claim by the Government for civil penalties. *Id.*

after 1985 (App. 100a.) and that Paul Hobbs did not discharge a pollutant in 1989. App. 98a. The District Court agreed. App. 31a. However, the same Jury found that both Phil Hobbs (App. 101a.) and Paul Hobbs (App. 99a.) failed to comply with the EPA Orders. The Hobbs failure to comply with the EPA Orders was their failure to plug the ditches and submit a plan to the EPA which required restoration of much of their property to its former condition. App. 124a and 132a. The Hobbs failure to comply was not a failure to comply with the CWA, but a failure to comply with restoration which the EPA required and the District Court ultimately refused to implement. The District Court and Court of Appeals by the application of "strict liability" circumvented this Court's holding in *Tull, supra* and prohibited the Hobbs from presenting to the jury evidence of their good faith belief that the EPA Orders were erroneous and the restoration demanded by the EPA was not physically or financially practical and not necessary to address the environmental harm alleged in the EPA Orders. App. 125 and 133a. As the District Court ultimately found, the quality of the water in the ditches met the EPA and State Water Control Board's drinking water standards. App. 26a. Accordingly the restoration demanded by the EPA Orders was clearly inappropriate.

The Court of Appeals' approval of the District Court's linkage of liability upon Count I (violation of the CWA for a discharge without a permit, if required) to liability upon Count II (failure to comply with the EPA Orders) results in precisely the due process deprivation prohibited by this Court. Until there has been a judicial determination of liability, which *Tull, supra* requires be determined by a jury, the claim alleged in the EPA Orders that the CWA has been violated, cannot be established. In the instant case, the Court of Appeals has approved the District Court's *ex post facto* validation of EPA Orders issued in March, 1989 and April, 1989 based upon a Jury Verdict rendered on January 26, 1990, thereby *exposing the Hobbs* to ". . . heavy penalties for violation of commands of an

unascertained quality . . ." which *might be imposed* during the penalty phase of the trial.[37]

Under the Court's decision in *Reisman* v. *Caplin*, 375 U.S. 440, 447 (1964) the Hobbs were entitled to interpose as a defense to the Government's claim for civil penalties for violation of the EPA's Orders a good faith defense to noncompliance, which the *Reisman* Court held to be a *remedy at law*. Otherwise the CWA provisions for EPA's issuance of Administrative Orders and suits to enforce Orders are *unconstitutional on their face*. Beginning with *Ex Parte Young*, 209 U.S. 123, 147-148 (1907) the Court has held that laws are unconstitutional on their face, ". . . when the penalties for disobedience are by fines so enormous . . . as to intimidate the citizen from resorting to the Courts to test the validity of the legislation . . .". In *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 336-337 (1920) the Court again held that the recipient of an Administrative Order had a right to assert the defense, irrespective of the outcome, when the penalty for each days violation was $500. In the instant case Count II of the Government's Counterclaim subjected the Hobbs to civil penalties of $25,000 per day for each day they failed to comply with the EPA's Orders. App. 116a.

The Government cannot and did not dispute that there were no administrative or pre-enforcement judicial pro-

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[37] Each Order given to the Hobbs is ". . . in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoratively determined. Liability to a penalty for violation of such orders before their validity has been determined, would put the party affected in a position where he himself must at his own risk, pass upon the question. He must either obey what may ultimately be held to be a void order, or disobey what may ultimately be held to be a lawful order. If the statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result would inevitably be that the carrier [or the Hobbs] would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid." *Wadley Southern Railway Co.* v. *Georgia*, 235 U.S. 651, 662-663 (1915).

cedures by which the Hobbs could contest the EPA's Orders, thereby distinguishing this case from *Wadley Railway Co.*, *supra* and *Reisman*, *supra* which did provide such a remedy. This trial provided the Hobbs *their only opportunity to challenge the EPA Orders.* The Government admitted that the Hobbs were provided with no prior notice, nor opportunity to be heard concerning the validity of the EPA Orders. JA 92. The District Court's dismissal of the Hobbs Complaint, based in part on the trial courts ruling which was affirmed, *Southern Pines* v. *U.S.*, 912 F.2d 713 (4th Cir. 1990), holding that Congress impliedly intended to preclude District Court review until an enforcement action was instituted, further demonstrates that the Hobbs only opportunity to *contest* the invalidity or inapplicability of the EPA's Orders was in defense of Count II of the Government's Counterclaim, *during this trial.*[38]

The Court of Appeals said in *Southern Pines* v. *U.S.*, 912 F.2d 713, 717 (4th Cir. 1990), "Southern Pines and VICO will have an opportunity to make their constitutional arguments at any enforcement proceeding before they are subjected to any injunction or penalty". The Court of Appeals has now clarified that a litigant's good faith belief defense will not be heard during the trial's liability phase before the jury, but during the penalty phase before the Court. The Court of Appeals has for the second time, held in direct conflict with the Second Circuit, *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2nd Cir. 1974), a conflict resolved by this Court in *Tull* v. *United States*, 481 U.S. 412 (1987), in favor of the right to trial by jury, that a Defendant in a Section 404, CWA enforcement action is not entitled to have the

[38] Until the Court of Appeals' decision in *Southern Pines, supra* it was presumed that the recipient of an Administrative Order under Section 404 of the CWA had Declaratory Judgment access to the District Courts to stay civil penalties, based upon this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 225-226 (1961).

issue of his liability for the *separate and distinct offense* of failure to comply with an EPA Order, *fairly submitted* to the jury.[39] Because the District Court refused to permit the Hobbs to explain to the jury why they did not comply with the EPA's demand that they plug the ditches and restore their property, when they had to concede that they did not comply, the Jury's Verdict on the issue of the Hobbs liability for failure to comply with the EPA Orders is nothing more than a directed verdict.

The Court of Appeals has placed the Hobbs and all future recipients of EPA Orders, issued pursuant to Section 404 of the CWA in a *double or nothing position.* If they are found to have violated the CWA they are also *automatically* subjected to the separate and distinct imposition of civil penalties of $25,000 per day for each day they have violated the EPA's Order, subject only to the mercy of the District Court at the penalty phase of the trial. If they are found, not to have violated the CWA, they are not subject to penalties for violating the EPA's Order. As a result of *Southern Pines, supra* the recipient may not challenge the EPA's Order through a Declaratory Judgment action to stay the penalties until the validity of the Order is determined in Court. The recipient must await the EPA's enforcement action as penalties accrue at the rate of $25,000 per day. Because the applicable

---

[39] In *Tull* v. *United States*, 481 U.S. 412 (1987) the Court unanimously *held* that where ". . . the Government sought penalties of over 22 million dollars for violation of the Clean Water Act and obtained a judgment in the sum of $325,000 . . . federal courts have rightly assumed that the Seventh Amendment required a jury trial." 481 U.S. 420. Having established that Tull was entitled to a jury trial to determine the factual dispute of liability for a violation of the CWA, there should be no different result for the Hobbs. The Hobbs were entitled to have the jury, rather than the District Court, resolve the factual issue of the Hobbs asserted good faith belief that the EPA's Orders were erroneous or invalid during the liability phase of a trial, which exposed the Hobbs to potential civil penalties of $12,150,000 each, for the separate offense of failure to comply with the EPA's Orders.

statute of limitations is five years, 28 U.S.C. § 2462, the EPA may delay enforcement until the civil penalty exposure reaches $45,625,000. The recipient's only alternative is to submit to what may well be a void EPA Order, a result the Court has held unconstitutional, *Ex Parte Young*, *supra*.

The Court of Appeals has by its decision in this case sent a clear message to the regulated community that when a citizen receives an Administrative Order pursuant to the CWA or any similar federal statute, exposure to enormous fines upon a finding of liability for a violation of the statute, *will automatically result* in exposure to enormous fines for failure to comply with the Administrative Order, no matter how valid the recipient's position that the Administrative Order is erroneous or invalid. This is precisely the coercive intimidation by the Administrative Branch of government of the citizen, the Court has held unconstitutional since *Ex Parte Young*, *supra*. The Hobbs were constitutionally entitled to defend against the EPA's Orders in this case without facing the imposition of potentially ruinous penalties, simply for availing themselves of their only means, administrative or judicial, to contest the EPA's Orders. The Hobbs were entitled, pursuant to *Tull*, *supra*, to have their defense presented to the jury, as a factual issue during the liability phase of their trial.

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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91-1422

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

S. PAUL HOBBS, and DONNA M. HOBBS, his wife and
PHILLIP RAY HOBBS, and DOROTHY V. HOBBS, his wife,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1861

S. PAUL HOBBS; DONNA M. HOBBS, his wife;
PHILLIP RAY HOBBS; DOROTHY V. HOBBS, his wife,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; WILLIAM REILLY, Administrator, United States Environmental Protection Agency (A-100); STANLEY L. LASKOWSKI, Acting Administrator, United States Environmental Protection Agency, Region III; GREENE A. JONES, Director, Environmental Services Division, United States Environmental Protection Agency, Region III; JOHN O. MARSH, JR., and/or; RICHARD L. ARMITAGE, after confirmation, Secretary of the Army; LIEUTENANT GENERAL HENRY J. HATCH, Chief, Army Corps of Engineers; MAJOR GENERAL JAMES W. VAN LOBEN SELS, North Atlantic Division Engineer; JOSEPH H. THOMAS, Norfolk District Engineer,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
Rebecca B. Smith, District Judge
(CA-89-327-N)

Argued: May 7, 1991

Decided: November 8, 1991

Before ERVIN, Chief Judge, STAKER, United States District Judge for the Southern District of West Virginia, sitting by designation, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

These appeals arise from a civil enforcement action brought by the Environmental Protection Agency for alleged violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, by Phillip and Dorothy Hobbs as well as the couple's son and daughter-in-law, Paul and Donna Hobbs.[1] The violations stem from the clearing, draining, and constructing of roads on approximately 50 acres of alleged wetlands to create hay fields. All of the Hobbses were subjected to penalties for violations of the CWA by the district court. The Hobbses appeal the district court's decision on various grounds. Finding none of their arguments persuasive, we affirm the district court's decision.

I.

A.

A brief review of the statute is necessary for an understanding of the law of this case. The Clean Water Act is a comprehensive statute designed to "restore and main-

[1] We refer to the defendants collectively as "the Hobbses."

tain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a)(2), 33 U.S.C. § 125(a). In accordance with this mandate, the Act bars the discharge of pollutants into waters of the United States except in compliance with a permit issued under the Act. CWA § 301(a), 33 U.S.C. § 1311(a). The term pollutant includes dredged and fill material consisting of soil, rock, and sand. CWA § 404, 33 U.S.C. § 1362(6). The Hobbses do not contest that their discharge material fits within the definition of a pollutant.

The term "waters of the United States" is not explicitly defined under the statute. The Act does define "navigable waters," however, as waters of the United States. 33 U.S.C. § 1362(7). The term "navigable waters" has been given the broadest constitutional understanding. A Legislative History of the Water Pollution Control Act Amendments of 1972, at 178.

"Waters of the United States" is also defined as waters adjacent to other waters of the nation. 40 C.F.R. § 230.3(s); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). EPA defines "adjacent" as bordering, contiguous, or neighboring. 40 C.F.R. § 230.3(a). Moreover, wetlands separated from other waters of the United States by "man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'" according to the EPA. 40 C.F.R. § 230.3(b). Finally, both the EPA and the Army Corps of Engineers ("Corps") define wetlands as:

> those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

40 C.F.R. § 230(t); 33 C.F.R. § 328(b).

The EPA is authorized under the Act to issue a Finding of Violation and a Compliance Order for any violation of CWA § 301(a). 33 U.S.C. § 1319(a). Moreover, EPA may commence a civil action for appropriate relief for a violation of CWA § 301(a).

B.

For the instant case, there are two relevant manuals for wetlands determinations, one produced by the EPA and the other by the Corps. Both manuals are used to aid in the determination of what constitutes wetlands. Each manual relies on three parameters to make a determination: hydrology, vegetation, and soils. The Corps of Engineers Delineation Manual was adopted in 1987. The EPA manual was adopted April 1988.[2] There is also an interagency manual, adopted by the EPA and the Corps, which was adopted January 10, 1989. The joint manual,[3] like the EPA manual, uses the three parameter test in a manner that expands the definition of wetlands. The jury was allowed to consider the multiparameter standard in each of the manuals.

II.

Phillip and Dorothy Hobbs own about 169 acres in Ware Neck, Gloucester County, Virginia. The Hobbses' son and daughter-in-law, Paul and Donna, also own 37 acres in the county. The combined property contains approximately 206 acres ("Hobbses' property"). The jury found this parcel to be wetlands adjacent to the Ware River.

The Hobbses cleared, drained, and constructed roads on approximately 50 acres of wetlands to create hay fields. In the process, the elder Hobbs discharged,

---

[2] Revised Interim Final Edition of April 1988.

[3] For the sake of clarity, the publication is referred to as the "joint manual." Its official title is the Federal Manual for Identifying and Delineating Jurisdictional Wetlands.

dredged, or filled material onto their wetlands in 1980, 1984, and 1985. The younger Hobbs did the same in 1986, 1987, and 1988. The Hobbses, however, did not apply for a § 404 permit from the Corps, as required by the CWA.

The Hobbses contend that they did not apply for a permit because they were under the impression that they were not required to do so. On September 29, 1988 an official of the U.S. Fish and Wildlife Service ("FWS") went to the Hobbses property and told Paul Hobbs they might be doing work on nontidal wetlands. The FWS official arranged a site visit by a Corps official. The Hobbses contend they overheard the two men talking and expressing doubt about whether the land was in fact wetlands. When Paul Hobbs asked about the property, the Corps official stated that "it was a grey area of enforcement for the Corps of Engineers . . . and he didn't see where the [Hobbses] had . . . done anything wrong." Moreover, the Corps employee told the Hobbses that he would get back to them about whether their land was wetlands; but he never told them whether the property was wetlands nor did the official tell them about a permit.

EPA issued the Hobbses a Findings of Violation and Compliance Order, or Administrative Order, on March 23, 1989. EPA subsequently amended the order on April 25, 1989.

III.

On April 25, 1989, the Hobbses filed a complaint challenging the EPA's Findings of Violation and Compliance Order issued against them under § 404. On May 4, 1989, the district court issued a preliminary injunction allowing the Hobbses to continue to farm that portion of the land previously converted to hayfields.

The government in turn filed a counterclaim on June 23, 1989, charging the Hobbses with violating CWA

§ 301(a) by discharging pollutants into wetlands without a permit. These counterclaim ultimately became the only cause of action in this proceeding, when, on December 14, 1989, the district court dismissed the Hobbses complaint and granted summary judgment in favor of the government with respect to its counterclaim.

The trial was split into a liability phase determined by jury and a penalty/remedy phase determined by the court. At the close of the first phase, the jury found that the couples' property was wetlands adjacent to waters of the United States and that they had indeed discharged pollutants onto their wetlands.

Following the penalty phase, the district court entered a Final Order on August 22, 1990. The court held that: (1) the Hobbses could continue to grow hay on the parcels of land already cleared; (2) the parties must either agree to a restoration plan for the 25 acres in transition or allow the parcel to revegetate naturally; (3) the undisturbed portion of the wetlands must remain that way; (4) as permitted by the statute, the Hobbses could change the use of any of the parcels upon approval of a permit; and (5) the elder Hobbs were ordered to pay $100.00 in civil penalties, while the younger Hobbs were required to pay $200.00.

On August 24, 1990, the district court issued a memorandum opinion and order addressing the post-trial motions. The court denied the Hobbses' motions for judgments notwithstanding the verdicts or new trials. These motions were based on a sixfold argument. All of the contentions were rejected. The district court held that: (1) EPA has independent authority to make jurisdictional determinations under the CWA; (2) the wetlands manuals were guidance materials, not substantive rules; (3) adjacent wetlands may be defined as waters of the United States under the CWA because the CWA is to be applied broadly under the Commerce Clause and in light of the ecological connection between waters and adjacent

wetlands; (4) man-dug (sic), non-tidal drainage ditches can be waters of the United States when they are constructed in wetlands; (5) good faith is not a defense to the strict liability violation alleged; and (6) there is no estoppel against the government absent affirmative misconduct by the government.

The district court also denied a second JNOV motion because the evidence at trial supported the jury's finding that the Hobbses properties are jurisdictional wetlands. Finally, on October 24, 1990, the trial court issued a ruling from the bench denying the Hobbses' Fed. R. Civ. P. 60(b) motion. The Hobbses appealed to this court.

IV.

A.

As previously noted, the Hobbses make six arguments, which we shall address in turn. The Hobbses first raise the issue of whether the EPA has independent enforcement authority over violations of sections 404 and 301 of the CWA, 33 U.S.C. §§ 1311, 1344. According to their reasoning, the question is whether EPA has the authority to enforce § 404 of the CWA when the issuance of a permit allowing pollutants is the sole province of the Corps. They contend that because the Corps did not find that the Hobbses were discharging pollutants onto wetlands nor required them to secure a permit, the EPA has nothing to enforce. Merely pointing to 33 U.S.C. § 1342, as the statutory grant of permitting authority to the Corps, however, does not mean that EPA lacks independent enforcement authority. Reading the whole of the statute[2] reveals the Hobbses argument to be proof-texting.

It should be noted from the outset, that as the Hobbses have not applied for a permit, it cannot be maintained that they were denied one. Moreover, nothing in the record suggests that the Corps actually refused to exert

jurisdiction over the Hobbses property through a wetlands determination.

Under 33 U.S.C. § 1311(a) the discharge of a pollutant is illegal "except" as in compliance with sections authorizing permits. Thus, the discharge itself is illegal. Accordingly, the Hobbses need not be required to secure a permit and subsequently pollute to violate the Act. The language of the Act confers upon EPA the authority to issue a Finding of Violation and a Compliance Order or to institute a civil action for any violation of CWA § 301(a). CWA § 309(a)(3); 33 U.S.C. § 1319(a)(3). Moreover, the Act authorizes the commencement of a civil action for appropriate relief, CWA § 309(b); 33 U.S.C. § 1319(b). Finally, permitless discharges of dredged and fill material are within the enforcement authority of EPA. Administrative Authority to Construe Section 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. No. 15 (Sept. 5, 1979).

This view is supported by the fact that EPA has independent authority to make wetlands determinations. In *Ayolles Sportmen's League, Inc. v. Marsh*, 715 F.2d 897, 903 n.12, the Fifth Circuit noted that the EPA and the Corps reached an agreement that the latter would have the responsibility for making final determinations. Moreover, the ultimate authority for determining the reach of navigable waters under § 404 of the CWA belongs to the EPA. Administrative Authority, *supra*.

In *National Wildlife Federation v. Hanson*, this Court recognized that while both the Corps and EPA "are responsible for the issuance of permits under the CWA and enforcement of their terms," EPA is the utimate authority. 859 F.2d 313, 315-316 (4th Cir. 1988). EPA would not be much of an authority if it could make wetlands determinations, issue permits, but could not enforce the very rule for which those permits provide the exception.

B.

The second issue is whether the EPA's wetlands delineation manuals are interpretive guidance documents or substantive rules with binding legal effect in the determination of what constitutes wetlands under 40 C.F.R. § 230(t) and 33 C.F.R. § 328.3(b). Closely related to this matter is the question of whether the EPA Manual constitutes substantive rules subject to the Administrative Procedure Act ("APA") notice and comment requirements, 5 U.S.C. § 553.

The Hobbses contend that the EPA manual represents substantive rules subject to the public notice and comment requirements under the APA. Their argument in effect is the manual does not merely clarify and explain the process of wetlands determination, but rather expands federal jurisdiction.

Whether the manual is subject to APA depends on whether it constitutes interpretive rules or substantive rules. The former rules " 'are those which merely clarify or explain existing law or regulations,' and 'do not have the full force and effect of a substantive rule but [are] in the form of an explanation of particular terms.' " *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (citations omitted). In *Jerri's Ceramic Arts v. Consumer Products Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989), we noted the distinction between the two rules:

> An interpretive rule simply state[s] what the administrative agency thinks the statute means, and only "remind[s]" affected parties of existing duties . . . [while] a substantive or legislative rule has the force of law, and creates new law or imposes new rights or duties.

Id., 207. Moreover, this court held that in determining whether a rule was interpretive or substantive courts must consider the agency's intent. *Id.*, at 208.

The intent behind the manuals and absence of the force of law make it clear that they are interpretive rules. The EPA manual states in its preface that it was "developed to address the need for operational and jurisdictional guidance." Moreover, the manual states that the methods offered for wetlands determinations "are the recommended approaches."

While the EPA manual does not possess the force of law, the EPA manual does represent a significant change in the definition and an expansion of jurisdiction. The change in definition, however, is premised upon the making of certain scientific assumptions regarding the presence of the three parameters for a wetlands determination. The Hobbses point to nothing in the record to suggest any explicitly political motivation or policy consideration behind the change in the parameter test. Without a showing of intent or legal force, the manuals are no more than interpretation rules.

Finally, for the reasons discussed, EPA was free to apply its own or another agency's manual; EPA possessed the independent authority. Moreover, the agency was not prevented from using the EPA manual under the APA. Accordingly, the district court was correct in allowing expert testimony with respect to all three manuals.

C.

The contention that the district court incorrectly instructed the jury to determine if wetlands on the Hobbses property were adjacent to waters of the United States is based upon a particularly weak premise. Again the Hobbses engage in proof-texting. Seizing upon the word "adjacent," they contend that their wetlands are not adjacent because they do not actually *border* waters of the United States.

Unfortunately for the Hobbs, the statute does not limit adjacency to literal bordering. The statute, which the judge quoted verbatim in the jury instruction, reads:

> The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetland."

33 C.F.R. § 328.3(c). This reading of the statute was upheld in *Riverside Bayview Homes*:

> . . . the landward limit of Federal jurisdiction under Section 104 must include any adjacent wetlands that form the border or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.

424 U.S. at 133-134, *quoting* 42 Fed. Reg. 37,128 (1977) (emphasis added). Furthermore, the jury's factual determination that the lands were wetlands is not clearly in error. An expert in hydrology and hydrogeology, testified that there was both a ground and surface water connection between the Hobbses' property and the Ware River. An EPA environmental scientist confirmed this observation based upon aerial photographs. The Hobbses land is adjacent within the meaning of the statute.

Moreover, the Hobbses' contention that their land is not adjacent due to the presence of man-made, non-tidal drainage ditches dug on dry land is baseless. Such ditches fall within the express language of the statute. The term "adjacent" includes:

> Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like . . . .

33 C.F.R. § 328.3. Similarly, the contention that the statute is void for vagueness is without merit.

D.

Next we turn to whether the district court violated the Hobbses' due process rights by denying them the opportunity to present evidence as to their good faith belief

that administrative orders were invalid. We address the good faith aspect of their argument first. This court previously held that a district court erred when it refused to impose civil penalties under § 309 of the CWA, reasoning that:

> [The language of the statute] leaves little doubt that, under the circumstances of this case, a penalty in some form is mandated. Liability under the Clean Water Act is a form of strict liability.

Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 368, 374 (4th Cir. 1979). Under the *Stoddard* standard good faith is not a defense. Moreover, the amount of the penalty to be levied is within the discretion of the court. *State Water Control Board v. Train*, 559 F.2d 921 (4th Cir. 1977).

The procedural aspect of the Hobbses' due process argument is that there are no administrative procedures by which they could contest the EPA's orders. Moreover, the Hobbses aver that they were not provided with prior notice or an opportunity to be heard before the issuance of the administrative order. The Hobbses, therefore, conclude that the lack of due process protection prior to the imposition of liability for civil remedies violates their due process rights.

This contention is without merit. The administrative orders do not in themselves impose penalties. Instead pursuant to CWA § 309(d), the penalties were imposed by the district court following a jury determination that the Hobbses had violated the CWA. Furthermore, in *Southern Pines Association v. United States*, 912 F.2d 713 (4th Cir. 1990), a landowner and a construction company similarly argued that the lack of opportunity to be heard prior to the issuance of a compliance order violated their due process rights. We held that as the company and the landowner would "have an opportunity to make their constitutional arguments at any enforcement proceeding before they are subjected to any injunction or penalty,"

there is no violation of the fifth amendment. *Id.*, at 717. Likewise, the Hobbses are afforded constitutionally adequate process.

E.

Paul Hobbs' contention that the record supported a jury instruction on estoppel is without merit. Specifically, he argues that the government is estopped from prosecuting him under § 404 of the CWA because he constructed the drainage ditches under the supervision and according to the design specifications of two Soil Conservation Service employees. The district court rejected this argument, because Paul Hobbs did not allege conduct by the SCS employees that was sufficient to estop the government.

In *Zografov v. V.A. Medical Center*, 779 F.2d 967 (4th Cir. 1985), we suggested a high standard in order for a federal employee allegedly misled by a Equal Opportunity counselor regarding an employment discrimination suit to rely on estoppel. We held that the plaintiff "made no showing of affirmative misconduct on the part of the government, which is the least the court would require, even if that would suffice, to rely upon estoppel." We agree with the district court that Paul Hobbs did not allege or prove conduct adequate to estop the government.

F.

The Hobbses aver that the district court abused its discretion in denying their Rule 60(b) motion. Specifically, they contend that the court abused its discretion in denying the motion to be relieved of the final judgment in light of "newly discovered evidence." The Hobbses argue that a September 26, 1990, Regulatory Guidance Letter ("RGL") issued by the Corps constitutes such evidence.

As a threshold matter, the RGL cannot be considered newly discovered evidence under Fed. R. Civ. P. 60(b)(2) as the letter did not exist at the time of trial. Moreover, there is not another "reason justifying relief from opera-

tion of the judgment" under Fed. R. Civ. P. 60(b)(6). In order for the Hobbses to secure relief under Rule 60(b) they must show timeliness, a meritorious defense, a lack of unfair prejudice to the government, and exceptional circumstances. *Werner v. Carbo*, 731 F.2d 204, 206-207 (4th Cir. 1984). Even assuming the final three conditions were satisfied by the Hobbses, they cannot demonstrate that the evidence would constitute a meritorious defense. The letter, like the manuals, is a guidance document. The letter merely clarifies the relationship between the jurisdiction of the EPA and the Corps under the CWA § 404 and the jurisdiction of the SCS under the provisions of the Food Security Act of 1985, 16 U.S.C. §§ 3821-3823. As the district court noted the letter is "merely guidance and doesn't change the definition of wetlands under the regulations."

V.

With respect to each of the issues on appeal, the district court's judgment, bench rulings, and opinion are affirmed.

AFFIRMED

Filed: November 25, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1861
(CA-89-327-N)

S. PAUL HOBBS, *et al*,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, *et al*,
Defendants-Appellees.

ORDER

The Court amends its opinion filed November 8, 1991, as follows:

On Page 6, first paragraph, line 1—the word "These" is corrected to read "*This*."

On page 6, first paragraph, line 3; page 6, fourth full paragraph, line 2; page 7, first full paragraph, line 13; page 7, second full paragraph, line 4; page 10, first full paragraph, line 2; and page 10, line 7 of text after second indented quotation—the word "Hobbses" is corrected to read "Hobbses'."

On page 10, line 4 of text after second indented quotation—the comma after the word "hydrogeology" is deleted.

For the Court—By Direction

/s/ John M. Greacen
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 89-327-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. PAUL HOBBS, *et al.*,
Defendants.

FINAL ORDER

[Filed Aug. 27, 1990]

This action is before the court on the complaint of the United States seeking injunctive relief and the imposition of civil penalties against the defendants for the unpermitted discharge of fill materials into waters of the United States in violation of Sections 301(a) and 404(a) of the Clean Water Act, 33 U.S.C. § 1311 and 1344(a). On January 26, 1990, a jury determined that the property owned by Phillip Ray Hobbs and his wife, Dorothy V. Hobbs, and the property owned by S. Paul Hobbs and his wife, Donna M. Hobbs, all located on Ware Neck in Gloucester, Virginia, are wetlands adjacent to waters of the United States. The jury found that defendants Phillip Ray Hobbs and Dorothy V. Hobbs discharged pollutants onto their wetlands property in 1980, 1984, and 1985. The jury further found that defendants S. Paul Hobbs and Donna M. Hobbs discharged pollutants onto their wetlands property in 1986, 1987, and 1988.

On May 17, 18, and 21, 1990, the court conducted a bench trial on appropriate penalties. On May 21, 1990, the court, after fully considering all of the evidence and arguments presented by all parties, issued an extensive ruling from the bench. This ruling articulated the factual findings pertinent to the penalty phase of the litigation, the amount of civil penalties imposed, and the type of restorative relief ordered.

With respect to restorative relief, the subject property is divided into three areas based on the amount of activity conducted thus far on the property: the cleared parcels, the twenty-five acre parcel in transition, and the undisturbed, forested parcels. The court ruled that the cleared area could remain in its current use. However, prior to any change in use, the restoration (water quality mitigation) plan proposed by defendants, subject to the court's modifications issued from the bench on May 21, 1990, must be put in effect. *See* Proposed Water Quality Enhancement Plan for the Hobbs Property Ware Neck, Gloucester, Virginia, Exhibit 11, *United States v. Hobbs*, Civil Action No. 89-327-N (E.D. Va. May 17, 18, 21, 1990); Transcript, *United States v. Hobbs*, Civil Action No. 89-327-N, at 33-34 (E.D. Va. May 21, 1990).[1] These modifications include: development of an acceptable outfall structure for the ponds; development of a maintenance plan which includes water quality testing; supervised construction of the ponds; and further investigation into flood preparedness, fencing and buffer zones. *See id.* Any change in use prior to the modified restoration (water quality mitigation) plan being in effect would be in violation of this court's Final Order.

To assure compliance with this court's Final Order, the following actions shall be taken by defendants, or any

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[1] Both of these documents are part of the record in this case and are incorporated into this Final Order by reference and are hereinafter collectively referred to as "the modified restoration (water quality mitigation) plan."

one of them as appropriate, prior to any change in use of their wetlands presently in hay cultivation:

1. Give thirty (30) days advance notice in writing to the United States Environmental Protection Agency, Region III, that such change is to be commenced.

2. Allow authorized representatives of the United States Environmental Protection Agency periodic access to the property during implementation of the modified restoration (water quality mitigation) plan to verify compliance with this Order.

3. Upon completion of all construction work required under the modified restoration (water quality mitigation) plan incorporated by reference herein, notify the United States Environmental Protection Agency, Region III.

4. Furnish to the United States Environmental Protection Agency, Region III, timely reports documenting the results of all water quality monitoring conducted pursuant to the modified restoration (water quality mitigation) plan incorporated by reference herein.

The parties were given thirty (30) days from the date of the court's May 21, 1990, ruling to devise a mutually agreeable plan for the twenty-five (25) acre parcel in transition from forested land to agricultural use. The court indicated that should the parties fail to reach an agreement, the parcel would remain in the state that it currently exists and no restoration would be ordered for that area. The parcel would naturally revegetate, and defendants would have to make appropriate inquiry as to the need for permits from the appropriate government agencies, should they desire to perform work on this area of the property in the future. Since the parties have not reached an agreement on this parcel, the parcel will remain as it is, and any future work planned on this parcel will be subject to any applicable government regulations and permit requirements.

In addition, the court ruled that the undisturbed portion of the subject property remain as it exists, since there was no showing that this area was environmentally unsound. Again, as with the parcel in transition, any desires on the defendants' parts to alter the condition of this undisturbed area may be subject to certain permit requirements of the relevant governmental agencies.

Therefore, it is ORDERED that the court's ruling from the bench on May 21, 1990, become final regarding penalties and restoration. Accordingly, the Clerk shall enter final judgment in favor of plaintiff and against defendants, in accordance with the jury's verdict of January 26, 1990, and this court's ruling of May 21, 1990, as follows:

1. Defendants Phillip Ray Hobbs and Dorothy V. Hobbs discharged fill material onto wetlands constituting waters of the United States in 1980, 1984, and 1985 without a permit in violation of Sections 301(a) and 404(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344(a).

2. Defendants A. Paul Hobbs and Donna M. Hobbs discharged fill material onto wetlands constituting waters of the United States in 1986, 1987, and 1988 without a permit in violation of Sections 301(a) and 404(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344(a).

3. Defendants Phillip Ray Hobbs and Dorothy V. Hobbs shall pay civil penalties in the amount of One Hundred Dollars ($100.00) within sixty (60) days from entry of this judgment, payable to the United States Treasury, in care of Craig B. Shaffer, United States Department of Justice, Post Office Box 23986, Washington, D.C. 20026-3986.

4. Defendants S. Paul Hobbs and Donna M. Hobbs shall pay civil penalties in the amount of Two Hundred Dollars ($200.00) within sixty (60) days from entry of this judgment, payable to the United States Treasury, in

care of Craig B. Shaffer, United States Department of Justice, Post Office Box 23986, Washington, D.C. 20026-3986.

5. Use, modification, and/or restoration of the wetlands property involved in this action shall be in accordance with the court's ruling of May 21, 1990, and Final Order of August 22, 1990.

The parties may appeal from the judgment entered pursuant to this *Final Order* by filing a *written* notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within sixty (60) days from the date of entry of such judgment. In the event that defendants, or any one of them, appeal, a Bond on Appeal in the amount of Ten Thousand Dollars ($10,000.00) shall be posted to protect the public's interest during the appeal period.

The Clerk is DIRECTED to mail a copy of this Final Order to counsel for the parties.

/s/ Rebecca Beach Smith
United States District Judge

Norfolk, Virginia

August 22, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 89-327-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. PAUL HOBBS, DONNA M. HOBBS, PHILLIP RAY HOBBS, DOROTHY V. HOBBS,
Defendants.

EXCERPT OF PROCEEDINGS

(Judge's Ruling)
Norfolk, Virginia
May 21, 1990

Before: Honorable Rebecca Beach Smith, Judge

* * * *

[2] THE COURT: All right, counsel. The first thing that I'm going to do is go through my notes and review certain findings and conclusions that I'm drawing from those, the testimony and the evidence that I've heard over the last few days. And I would tell you that they may not be in any specific order or with any type of organization, but it will give you an idea of what I'm relying upon to then make the legal conclusions that I will draw.

First of all, there are three types of areas involved in this case at this point in time. There are the cleared areas, primarily in pasture grass. There are the forested areas which have not been cleared. And then there's the area that's been referred to as being in transition. It's an area that's cleared but not yet planted. It's approxi-

mately 25 acres of cleared but not planted area. So, those are basically the three types of areas that the Court will be dealing with in addressing the damages, primarily the restoration plan.

Mr. Butch testified on cross-examination—or he testified on direct examination that there were various alternative uses for the property, and that testimony was then brought to light more clearly through [3] cross-examination. He indicated that there may be some potential use for forest products but this would be a long-term use; that there may be some use for fur bearers, for producing fur, but this was speculative and no specific studies had been done in that regard. There may be some potential for hunting leases, but that had not been studied by the United States. The only indication of any hunting on the property came through the testimony of Mr. Paul Hobbs, who indicated he let the neighbors hunt the property because they kept an eye on it. There was no indication that he had derived any revenues from any hunting leases or that there was any real potential for leasing the property out for hunting.

Mr. Butch also indicated that the property might be available for nature observation, but, again, he said that there had been no studies made by the United States in that regard.

He also indicated that it might be a good buffer area for people who want to live in these types of areas. Again, there had been no studies done in this regard by the United States.

He also indicated it might be a potential area for scientific study, but again he testified that the EPA or the United States had not really studied that possibility.

[4] The conclusion the Court would draw from that is while there may be some various alternative potential uses, none of them have been studied, and none of them at this point are established for the Court beyond any type of speculative stage other than, perhaps, the forest products which, again, is the long-term use.

Mr. Butch also specifically testified that no site-specific studies had been conducted by the Environmental Protection Agency or the United States and that to develop the restoration plan he, with the help of Mr. McGlaun, had simply relied upon the general literature in the field.

That testimony was also corroborated by both Mr. McGlaun and also by Dr. Contula, who indicated that she had not been privy to any site-specific studies other than the water quality study conducted by the defendants.

Mr. Butch and Mr. McGlaun spent approximately one-half day on the site in order to develop the plan, the restoration plan, at least at the restoration plan stage. Both had been on site prior to that for brief amounts of time.

Mr. Butch testified that he was not a qualified witness to answer any questions about water quality.

Mr. Butch also indicated that the United [5] States' plan did call for the removal of the materials and the filling of the ditches back to the original elevation, but he quite candidly admitted he did not know what the original elevation would be.

Mr. Butch also testified that he did not know how far away from a ditch it drains in making the recommendation to plug the ditches.

Mr. Butch also testified that a major consideration in developing the United States' plan was the no-net wetlands loss policy that had been developed and basically had come to fruition since December of 1988.

In developing the United States restoration plans, both Mr. McGlaun and Mr. Butch expressed concern for plugging the ditches down near the church and the developed area that is between the Hobbs' property and the Ware River, because the ditches would be necessary to remove water in those areas or they would run the risk of flooding other people's homes and the church area, or at least putting unnecessary water or extra water onto that property.

No one in proposing either plan to the Court has given the Court any indication that there was consideration taken as to any type of natural flow original ditching system that may have existed back in [6] colonial times to which Dr. Johnson testified and exactly what the Hobbs did to enhance that system or to enhance ditches that were present on the property when they purchased it.

Mr. McGlaun was clear that after the fact permits were not accepted by the Corps of Engineers until any interim corrective measures or any restoration plan had been completed, and the case law would also support that conclusion.

Mr. McGlaun testified that one of the primary concerns, environmental concerns, of both the EPA and the Army Corps of Engineers and that he had and Mr. Butch had in developing this restoration plan was for sheet flow and that sheet flow was important because of erosion considerations, detrital export considerations and water purification considerations.

However, as Mr. McGlaun candidly admitted, there was no showing that the water on this property from the current sheet flow is impure. There is no erosion shown other than from the acreage that's in transition. And the Court would conclude from his testimony and others that there was no showing that the detrital export was going to be environmentally any better with the ditches plugged than with the ditches unplugged. And, in fact, there was testimony, credible testimony, before the [7] Court from Mrs. Phillips that detrital export could also pose a potential pollutant, and I'll go into that in a moment.

But I would say that at this juncture the Court would conclude that there's been no showing that the plugging of the ditches would enhance the detrital export in an environmentally sound manner any more than it's handled through the ditches.

Mr. McGlaun specifically testified that water quality was extremely important in any consideration in a resto-

ration plan that he would give but that neither the EPA nor the corps had done any testing in regard to water quality off of this property.

No hydrologist was consulted, while the restoration plan that's been urged—everyone has testified, at least from the standpoint of getting it approved, that hydrology is the driving force behind the plan. No hydrologist has looked at this plan, and no hydrologist has been brought before the Court to testifiy. None of the witnesses testified they were expert hydrologists. Some of them had experience in the area, but the two people who developed the plan, Mr. McGlaun and Mr. Butch, both admit that they are not hydrologists.

The plan calls for the removal of all of the [8] roads, yet the testimony before the Court is that timbering is not a prohibited activity. And, in fact, Mr. Butch said that that was a potential use for the property, and yet the evidence would support a factual finding that roads would be necessary for any type of timbering operation on property of this size; that you wouldn't be able to even get the timbering equipment in without some roads to handle the equipment.

The Court would note—and this is a bit out of order—that both of the plans that have been submitted to the Court are, frankly, extreme plans. On the one hand, the government demands total restoration, and, on the other hand, the Hobbs want to do no restoration so that they're both extreme plans.

And I would also note that from a review of the case law the government, generally, at least, gives the Court a couple of plans or a couple of alternatives to choose from and gives the Court some help in this area to say that, here's what we want and here's what we think is best, but here's some alternatives. And in this particular case apparently the parties aren't able to get together on any alternatives, and neither side has produced anything to the Court in the middle. You've both just come out with two extreme plans, leaving it up to the Court to see what can be worked out, which is not [9] what I think

the law envisions when you get to this stage in the proceedings.

Again, I would emphasize—I'm just going through my notes, and I may be repeating things that I've said before, but there were no scientific—because there was a lot of repetitious examination, and I tended to take notes on the repetitious examination—there were no scientific tests made by the United States and no site-specific information developed.

In regard to Ms. Terry Phillips' testimony, I found Ms. Phillips to be a credible witness. Ms. Phillips relied upon the water quality testing of Reed & Associates. That testing the Court accepts, because there have been no alternative tests offered, A, and, B, the United States stipulated as to the results of those tests. Those tests show a very high water quality currently coming off of the property, a water quality that meets both the EPA and the State Water Control Board's drinking water standards.

Ms. Phillips testified that in reviewing those water quality studies there were no sources of pollutants coming off—no significant sources of pollutants coming off the property, and the focus was on the Chesapeake Bay indicators for water quality, and some of the concerns for the Chesapeake Bay, and none of those—the nutrient [10] levels and the nitrogen levels were found to be at all violative of any standards for the Chesapeake Bay or any indication that there was being any danger posed to either the Ware River or the Chesapeake Bay from the water and the drainage off of this property.

Mrs. Phillips did testify that best management practices had been utilized in building the roads and in constructing the drainage ditches.

She testified in regard to the ditches that they were outstanding; that they had been properly cleared and stabilized; that there was nothing that could have been done otherwise under best management practices for construction of the drainage ditches.

And at this time the Court would also note, based upon previous testimony before the Court, that it's an uncontroverted fact the Hobbs were working with the Soil Conservation Service out of Gloucester to design and dig these ditches and that they were revegetated as soon as they were dug and that there's been no showing before the Court that they posed any significant erosion problem or that they were not constructed in accordance with the Soil Conservation Service's mandates and requirements. And, in fact, they were working together to see that these ditches were constructed properly. When I say "working together," the Hobbs with the Soil Conservation [11] Service and vice versa.

Ms. Phillips also testified that under the restoration plan that it would pose a disturbance of sediment, the filling of the ditches themselves would disturb the sediment and introduce a potential source of contaminants into a waterway. Ms. Phillips also again testified on the three sheet flow areas, erosion, water quality and detrital export, and, without reiterating all that, found no problems, and, in fact, the plan that the government had proposed in her opinion might impede some of these factors, i.e., increase erosion and not help the detrital export.

She testified and the Court found credible that hay fields are self-maintaining; that they require less fertilizer than other products, than even, perhaps, timber that one might be trying to bring along. Her plan that she developed does provide for flood mitigation.

She testified that storm water retention is not necessary in its current use but that it would be if the use were changed and that cattle would introduce a potential contaminant unless handled properly on the property, which was the impetus for the development of the plan proposed by the defendants.

She testified that the site-specific studies which she had utilized were the soil studies, the [12] hydrology studies, the rainfall data, the current site configuration, as well as the specific water studies.

She testified that in her opinion the plan that would be developed for changing use of the property to cattle farming would provide superior protection to the water quality and restoration of water quality than the government's plan would if the land were put back or potentially put back.

And I would also note that there's no definitive testimony before this Court that the government's plan would ultimately have the effect of converting the property back, if it were all wetlands in the first place, to wetlands. There's only that hope and a high degree of probability that that would occur, but there's no assurance of that.

Also, the Court—and this again is not necessarily in sequence, but I think something that the Court has to keep in mind, as any court would, is that—and this has been alluded to throughout the proceedings—that protecting and restoring wetlands is certainly of primary concern to this Court and to any court considering these types of situations.

On the other hand, the only reason that this Court has jurisdiction over these wetlands is because of its adjacency to the Ware River. If these were isolated [13] wetlands and did not constitute waters of the United States this Court would not have jurisdiction over these wetlands, so that the jury's verdict was based upon these being wetlands adjacent to the Ware River or one of its tributaries.

So, obviously, of consideration to the Court in looking at the environmental effects and the environmental harm that's proposed by either one of the plans is a strong consideration of the water quality in the Ware River and the Chesapeake Bay. And I want to make it clear it's not the Court's only concern. I do not agree with Mr. Nageotte's principle that the Clean Water Act only looks to water quality. The Clean Water Act looks to more than water quality, it looks to the factors that I've gone through before, which is to restore and maintain the chemical, physical and biological integrity of the nation's

waters. And that's more than water quality, it involves all of the biological aspects that contribute to that water quality, so that while water quality is a primary concern, it's not the only concern. On the other hand, in this case the Court wouldn't have jurisdiction over these wetlands if they weren't adjacent to the Ware River or one of its tributaries, so the Court has to take that into consideration.

[14] There was some mention of the constituents of the road, there being some asphalt in the road, but the credible testimony is that any runoff from those roads would only put a negligible amount, if any, of the rock/asphalt particles into the water, and certainly not a significant amount to harm the water quality.

The testimony before this Court at this hearing and before the jury would indicate that the first contact that any of the Hobbs actually had with a representative of the Army Corps of Engineers or the Fish and Wildlife Service or the EPA would have been in approximately October of 1988 when Mr. McGlaun came onto the property. The Court would find the credible testimony to indicate that Mr. McGlaun indicated that the property posed a gray area of enforcement to the Corps and that he would get back to Mr. Paul Hobbs regarding the matter.

The testimony that the Court finds credible indicates that Mr. McGlaun and no one from the Army Corps of Engineers ever got back to any of the Hobbs; that the resulting scheme of activities consisted of Mr. Frasier making a study of the property. Mr. Frasier is from the Fish and Wildlife Service. Mr. Frasier then, on December 12, 1988, transmitted a report to the Environmental Protection Agency.

The Environmental Protection Agency then [15] contacted the Hobbs, at which point Mr. Paul Hobbs—with an opinion that their property involved wetlands over which the EPA had jurisdiction, they would like for them to please plug the ditches, and Mr. Paul Hobbs at that point requested that the EPA's position be put in writing, at which point it was put in writing and a cease and

desist order was issued in March—I don't have the exact date—I'm recalling 12 in my mind at this point, but it's somewhere in March of 1988. It was then revised because of some matters about the adjacency to the Ware River that Mr. Paul Hobbs raised. Legal counsel was then retained at some juncture in there, and the matter then proceeded into this Court.

Judge Kellam did grant an injunction to the Hobbs at the initial inception of this case to allow them to continue their farming operation on the property until this matter was resolved.

The testimony before the Court is that Mr. Phillip Hobbs' costs to improve the property thus far have been approximately $124,000; that Mr. Paul Hobbs' cost to improve his property have been approximately $292,000 thus far. And there's testimony that some economic benefit has been derived off of the property. There has been some minor amounts of sale of hay and timber off of the property.

[16] There's no indication that the Hobbs ever refused to cooperate with any government agency. No one has ever been refused entry to the property.

The only testimony in regard to the cost of the plan came from Mr. Paul Hobbs. The government offered no testimony and no analysis of what its restoration plan would cost and the practicalities of implementing it other than the Hobbs own some heavy equipment and would be able to use their own equipment and work on the property part time themselves.

Mr. Paul Hobbs, who has been estimating this type of work or similar work for approximately 23 years, has estimated that his father's costs to implement the government plan would be $96,825 and that his costs would be $225,925.

Exhibit Number 10 before the Court shows the financial situation of the Hobbs, and I'm not going to review that. There's been no indication that there's any falsity or any inaccuracies in their financial statements, and the

Court accepts Exhibit 10 as reflective of their financial situation.

Mr. Paul Hobbs testified that the cost of implementing their restoration plan, the one that Mrs. Phillips developed, to his father would be $105,400 and approximately $128,000 for him.

[17] There's no history of violation on the part of these individuals. As far as this Court knows, they've never been in this Court or any other court on violations of the law, in particular of the Clean Water Act.

Once they received the cease and desist order no further work has been done on the property. Mr. Paul Hobbs did continue to work on the 25-acre tract, I believe, and I'm not sure about the planting. I can't recall that. But he did continue some work after Mr. McGlaun came out to the property, but not after he received the cease and desist order.

The jury found no 1989 violation of the Clean Water Act on the part of Mr. Paul Hobbs. There was no such violation even presented in regard to Mr. Phillip Hobbs.

Ms. Contula testified that she had certain concerns about both plans. She said under the Hobbs plan or the United States plan that she was concerned that whatever areas were disturbed that they be revegetated and stabilized as soon as possible to keep down any erosion. She expressed certain concerns about the cattle; to be sure there was proper fencing and buffer strips, other than just water troughs, to keep them away from the edges of the ponds and the edges of the ditches. And she also expressed some concern about the [18] density of the cattle. However, as it ultimately came out, the cattle density would be dependent upon Soil Conservation Service and the agricultural standards that would be applied to the property and that the plan did call for fencing and buffer zones in addition to the water troughs.

She expressed concern for water quality monitoring as the land use changed.

She expressed concern for the fragmented habitat areas but again admitted that no one had actually gone in there

to see what types of habitats were being created. There was a mention of deer and racoon, but there is no showing that these are any types of threatened habitats in this area. There was no indication of any threatened aquatic life or any aquatic life habitats, only—and there was no indication that the deer or the racoon would be threatened, it was just that wooded areas would give them more habitats, but no indication that those types of habitats were lacking in this area in the State of Virginia or anywhere in the United States.

She admitted that the current water quality was good from what could be—she could tell. She did say she would like more studies and at different times of the year and as the use for the property changed.

[19] And there was some indication that she had seen hawks, insects and crayfish, but that particular testimony, in the Court's opinion, was never properly developed. There was no indication that the hawks didn't have a place on the property. And, again, the crayfish—we got into some lengthy discussion about how many crayfish holes were in the hay field versus the ditches, and nobody ever seemed to be able to work that out. So—and there was no indication of what types of insects were on this property, vis-a-vis uplands property, and whether there was any type of threatened species of hawk, insect or crayfish on this property.

Nutrients she indicated were a primary concern in the Chesapeake Bay system and that the nutrients were low on the Hobbs property, and that was good.

She expressed some concern for an outfall structure on the proposed pond, because she was worried that the fish would be able to get out, and then on cross-examination she admitted that if a proper outfall structure was developed, a proper maintenance plan and the construction would be properly supervised, the pond embankment would be vegetated after excavation, that there would be some type of ten-year flood event verification, that those particular corrective measures would make her more comfortable with the Hobbs plan.

[20] The Court would also note, as it has noted earlier, that the standards have been constantly evolving and changing in this area. I agree with Mr. Shaffer that the definition of wetlands has not changed from a legal standpoint of regulation.

On the other hand, the wetlands determination and the guidelines for determining what is a wetland by the various enforcement agencies has changed since 1980, and various manuals have been developed. And a new manual did come into existence in April of 1988 with the EPA, and on March 20th, 1989 a new joint manual came into effect as between the EPA and the Army Corps of Engineers. Those are matters of fact and law in the record.

All right. Now turning specifically to the damages that are requested, I'll first address the area of civil penalties.

All right. 33 United States Code Section 1319(d) states, quote, "In determining the amount of a civil penalty the Court shall"—mandatory language—"consider . . ."—and it sets forth the various factors that the Court will consider. And I'll go through them one by one.

The first is the seriousness of the violation. On the one hand, the United States argues that this is a [21] particularly serious violation because there's been approximately a hundred acres of wetlands destroyed. On the other hand, the Hobbs have argued and presented through their restoration plan that the water quality has not been damaged.

And if you go through the environmental factors that the Court needs to consider, which I will do in a moment when we go through the restoration plans, this is not the type of serious violation that would warrant particularly heavy civil penalties. When it's measured against the objectives of the Clean Water Act—and that's what you look at, you look at the seriousness of the violation measured against the objectives of the Clean Water Act.

And I'm not going to repeat what I said earlier, but I make it clear the Court takes into consideration the importance of wetlands on the one hand but also the importance of the preservation of the waters of the Chesapeake Bay and the Ware River and the other environmental concerns, the flood protection, wildlife habitat, aquatic habitat. And I'll go through all of those when I review the restoration plan.

The economic benefit resulting from the violations. There's no showing here that either Mr. Phillip Hobbs and his wife, Dorothy, or Mr. Paul Hobbs and his wife, Donna, have, at least at this juncture, [22] benefited economically to a large extent from their particular action. There's some showing that they sold some timber, nothing in any significant amounts, from the property, and some hay. There's no showing of any great economic benefit resulting to any of them at this juncture.

The third consideration is the history of violations. As I've indicated, there is absolutely no history whatsoever of any violations on the part of these individuals.

The good faith efforts to comply with the act. And the cases in this area have focused on individuals who generally start into a permit process and whether they then try to comply with the act and comply with what is being asked of them.

In this particular situation, while it's a strict liability statute and the Court is well aware of it, the Court still has to be cognizant of the fact that these people did not willy-nilly and in an egregious manner go out to violate the environmental laws of the United States, and they were working with the Soil Conservation Service, they thought they were complying with environmental protection regulations when they took these actions, and it wasn't until the Army Corps of Engineers and Mr. McGlaun went out there in 1988 that [23] anybody, at least from the Hobb's standpoint, had any idea they were subject to any regulations other than the ones

they were already under from the Soil Conservation Service.

Mr. Paul Hobbs did continue to do some work on his property after he was put on notice, albeit minor, that the property might constitute a wetlands.

The fifth concern—and as I said before, Mr. Phillip Hobbs did no work on his property, and when the cease and desist order came they did absolutely nothing until Judge Kellam told them they could, and the jury found no 1989 violations. So, the only thing the Court would be concerned with was what was occurring basically from October of 1988 until October of 1989 from Mr. Paul Hobbs.

The economic impact of the penalty on the violators. Well, it's clear here that any economic penalty would have a pretty big effect on these individuals. The current net worth of Paul Hobbs is reflected to be approximately $129,000 and of Mr. Phillip Hobbs, approximately —and these aren't the exact figures—$321,000. The penalties, particularly if the Court were to order restoration, would exceed—the restoration would close to exceed their net worth under the estimates before the Court.

[24] But, in any event, given the amount of money that they put into the property and their net worth, any substantial penalties would have a pretty strong economic effect on them.

Finally, and most importantly, at least,—I wouldn't say most importantly, but certainly importantly in this case are such other matters as justice may require. And I reiterate here that this is a case that, A, when the Army Corps of Engineers went out there they said, this is a gray area; B, nobody was flagrantly violating the law, they were working with the Soil Conservation Service; and, C, as soon as they got that cease and desist order they stopped, they didn't do anything without court approval.

So, given all of those considerations, the Court would for the violation itself, the seriousness of the violation in regard to the only one of these factors that weighs at all against Mr. Phillip Hobbs is the violation—in other words, that wetlands may have been destroyed in this matter—the Court would levy a civil penalty on him of $100.

In regard to Mr. Paul Hobbs for the violation itself and for any continuation of activity after Mr. McGlaun went out there, the Court would levy a penalty on him of $200, a hundred for each of those considerations.

[25] Now to the restoration plan. The cases that have been cited to the Court—I'm not going to review them all, I will review some of them. As a lead case, the United States v. Weisman, found at 489 F.Supp. 1331, Middle District of Florida, 1980, relying upon United States versus Sexton Coves, Incorporated at 526 F.2d 1293, a Fifth Circuit case, 1976, that court indicated that two prerequisites had to be met before restoration could even be considered, and the first was that the property be under the jurisdiction of the Court. Well, it is under the jurisdiction of the Court. The jury has determined that there's been a discharge on wetlands, and the Court has heard that testimony and liability has been established. And the activity is to be directly affected by the restoration plan.

The second consideration is that the Court is required to hold a hearing and take evidence on the merits and alternatives to the restoration plan. And that's what we've been here for these last three days, taking this evidence and conducting the hearing.

After those two prerequisites are met, the Court then in selecting a restoration plan or even considering restoration looks to three things. Number one, whether the plan confers maximum environmental benefits. Two, whether it's achievable as a practical [26] matter. And, three, whether the plan bears an equitable relationship to

the degree and kind of wrong which it is intended to remedy.

In regard to the—and what I will first do is focus on the plan of the United States, because the United States is the one who wants restoration. They are the ones seeking the damages in the form of restoration, and, consequently, it's their burden to present an acceptable plan to the Court and one which is not speculative and meets the criteria as set forth, as I just previously set forth.

The first is whether or not the plan confers maximum environmental benefits. Well, frankly, it's difficult, if not impossible, to tell from the government's plan whether or not it confers maximum environmental benefits. There have been no site-specific studies done. The only site-specific study done has been done by the defendants, which shows that the water quality is exceptional on the property.

In regard to the environmental benefits that are set forth in the government's plan, every paragraph is based upon some general paragraph in the literature without any reference to this specific piece of property. And I'm going to go through the environmental values, and I'm reading from Exhibit 1, which is the [27] government's plan.

Their first environmental value is for water quality improvement. Well, there's no showing here that the water quality needs to be improved, and, in fact, there's a showing that the water quality is exceptional.

Secondly, flood protection. And there's a general statement here that wetlands, such as those found at the Hobbs' property, are often referred to as natural sponges that absorb flooding waters. There's no showing here—and, in fact, the plan presented by the Hobbs takes care of any concerns for flood protection, and there's no showing here that the drainage ditches and the current status of the property doesn't protect not only the Hobbs' property but the surrounding property from flood protection.

It was a concern expressed by the United States that if they caused the Hobbs to plug up all their ditches they may flood neighboring property so that it appears that the current drainage ditches and the plan proposed, the pond plan proposed by the Hobbs, takes care of flood protection in the area, at least as well as the Court can determine, because there's no specific showing, only general conclusions in the government's plan.

The next one is wildlife habitat. And all the government says here is that forested wetlands such as [28] those of the Hobbs' wetlands are valuable wildlife habitats. And they go on to talk about a variety of birds, migratory water fowl being one, and yet there's a specific showing under the Hobbs' proposed plan that it would attract migratory water fowl to the area. And then there's some mention here that these types of wetlands give a habitat for racoon, opossum, squirrels, rabbits, quail, foxes and white tail deer. Again, there's no showing that these animals are actually on the Hobbs' property, number one, or, number two, that there's any threat at all to this habitat and that the Hobb's current plan doesn't give adequate habitat to these species.

The next is natural products, that there's a wealth of natural products. Now, those mentioned are, number one, lumber, but the government's plan calls for removal of the roads so that you couldn't then engage in this without, of course, restoring—going through what the Court considers an illogical exercise, which is to remove the roads, restore the property, then go back to the Corps and reapply for the roads and see if you can get the roads in then, which is certainly an economic and time waste for all the resources of the United States and the Hobbs.

Then there's some mention here of shell fish [29] production and blue crabs and the aquatic life. But as I've indicated before, there's no showing that this property is doing anything to damage those types of product or the aquatic life. It's also that the detrital, the enriched detrital, would serve as a principal source of food. But,

as I've indicated, the experts say that the detrital export —at this juncture there's no problem with it on the property, so that the Hobbs—excuse me—the United States restoration plan for the Hobbs property is so un-site-specific as to be unacceptable to the Court to be able to determine whether it confers maximum environmental benefits. All the United States is doing is saying plug the ditches, flood the property and we'll see if we can make it into a total wetlands. We're not sure, but we'll see. And it's impossible for the Court to assess the environmental benefits from that.

Secondly, whether it's achievable as a practical matter. The United States has come in here with a plan that, number one, all it is is a piece of paper with some orange lines on it with specification that these ditches are to be plugged back to natural contours and original elevations. From a practical standpoint, it would be very difficult for the Court or anybody supervising this plan to be able to go in and see that [30] the requirements of it had been met. And what the United States wants the Court to do is to leave it up to the EPA or someone in the government to go in and say, yes, that suits us. But that's not the stage we're at now. The Court should issue a restoration plan that can be put into a court order that someone can know is going to be met or not met. And at this point in time I—there was something else in there that would be most difficult—I'm trying to find it.

Oh. I want to go back to the environmental benefits for a moment, too. One of the detrimental environmental benefits that the Court sees with this plan is it calls for removing all the side-cast material and all the dredged and fill material used for the road and basically putting all this excavated material back into the ditches.

Now, there's some indication that this would cause erosion problems, this can cause more serious pollutants into the water flow than you would by leaving the vegetated ditches there, and then it calls for whatever stone

and waste and gravel that you can't get back on the property to then take it off site and dispose of it at an approved upland disposal site, perhaps on the property. So that the removal of the material, whatever, there's nothing here to show or for the Court to be able [31] to assess except the testimony of Ms. Phillips to show that this is environmentally sound to go about digging up the roads that are already in place and not posing a problem to the water quality to dig those roads up, to put all this fill material back into the ditches, to let the water drain through all of this material so that again there's no showing there of the environmental benefits of this plan.

Again, back to the practicalities. No cost analyses have been done by the United States. And their argument here is, well, let the Hobbs do it, let them use their own equipment. And the only cost analysis that's been done is by the Hobbs, and, frankly, it shows a prohibitive cost to accomplish this work at this juncture. So, the Court would find that at this point there's no showing that this plan is achieveable as a practical matter from either a cost standpoint, from a specifications standpoint, and, again, it may even cause some detrimental and environmental repercussions.

And, finally, the plan has to bear an equitable relationship to the degree and kind of wrong which it is intended to remedy. Again, here, taking—I don't want to review all of the technicalities, but you first have to look at the Ware River and the Chesapeake Bay. One of the underlying basic purposes of the Clean Water Act is [32] to promote the water quality, and this plan, A, isn't even looking at water quality—nobody's even looked at water quality with the plan—and B, there's the testimony from Ms. Phillips that this sediment, erosion, might even damage the water quality.

The equities weighing in their favor that all this was done under the auspices of the Soil Conservation Service, and to now come in and say you have to spend 300,000 to fill ditches that the Soil Conservation Service in the first

place helped you or gave you direction on putting in somehow doesn't seem equitable in this particular situation. Again, being a gray area of enforcement and no indication that there was anything wrong until the fall of 1988.

And I don't want to repeat all the equities I went through with the civil penalties, but all those same equities apply, and this particular plan simply doesn't favor an equitable relationship to the degree and kind of wrong which it is intended to remedy in the Court's opinion.

So, consequently, based upon all of that, the Court rejects the government's plan. I do not find that it's adequate under the law or the facts of this case, and the Court would reject that particular plan.

In regard to the Hobbs' plan, the Court will [33] accept the Hobbs' plan with certain modifications, and those modifications would be as follows:

First of all, there has to be an acceptable outfall structure developed to keep the fish that are going to be put in the ponds—to be sure that they are in there.

There has to be some maintenance plan developed, somebody to come in and check to be sure that everything is functioning properly, at least for a ten-year period.

There needs to be some provision made for the construction of the ponds to be supervised, and Mrs. Phillips would be an acceptable person to do that. As the ponds are excavated, the banks would have to be vegetated after the pond excavation.

You need to look further into this ten-year flood event verification and be sure that the pond sizes are adequate to take care of the flood events and that ten years is an adequate time period. The evidence was a bit weak as to how she finally arrived at ten years as being an appropriate time period for the ponds.

The other matters in regard to the fencing and the buffer zones, that needs to be developed in more detail. That's very generalized language in that plan. There needs to be some specifics as to where the fences [34] and the buffer zones would be in regard to the cattle as well as the water troughs. All the plan says is we'll have

fences, buffer zones and water troughs. The Court would want some indication as to where those would be and the extent of those three times.

In terms of any density of any cattle on the property, again, that would be left up to another government agency to determine.

The Court would also want as part of the plan some way to test the water quality over the ten-year period of the maintenance plan so that someone can monitor—as the use of the property would change into cattle farming the water quality could be monitored in some acceptable mode to monitor the water quality.

Now, in terms of the one piece of transitional property, the way the Court looks at what is occurring today is the government's plan is rejected and the Hobbs' plan is accepted with certain modifications which I'm going to give you all a time period to go back and work out and get an appropriate order to the Court. That basicsly covers—and if you all are in disagreement, I'm going to want to know now.

That plan basically covers the—as I started this decision out, there are three different areas. There's one, the undisturbed forested areas. And this [35] Court makes no order in regard to those areas. I am not going to order prospective injunctive relief on those areas. The Hobbs know the rules now, and if they don't follow those rules they're the ones who are going to suffer the repercussions. It would be, in this Court's opinion, inappropriate to go in and order somebody to follow the law on the undeveloped property.

Now, I'm going to make three distinctions here. That's undisturbed property just like any other undisturbed property in the United States. It's subject to the laws, environmental laws, of the United States, and if any action is taken on it, if the Hobbs think there are wetlands there, then they're going to have to seek the appropriate permit from the Army Corps of Engineers.

If they don't think there are wetlands there and they do their development anyway and it turns out to be wetlands, then they suffer some pretty heavy repercussions, because the whole civil penalties area changes on the next case, because then you've got a history of violation, a showing of lack of good faith compliance with the act. Your whole case changes. So, as far as this Court is concerned, I'm not going to order prospective injunctive relief on undeveloped areas. It's the same as anybody else, and they know the rules.

[36] The plan that is being denied from the government and the plan that's being put in effect deals with the areas that are now developed and disturbed. Now, that leaves the question of the transitional area.

And before I go any further on that, what's the United States' position—what can they do with that transitional area under current law?

MR. SHAFFER: Well, obviously, the current law prohibits the discharge of fill material into wetlands. We would submit the jury has found as a matter of law that these are wetlands, and, so, therefore, to the extent that they continue to discharge in that area we would submit that's a violation. We would also submit, Your Honor, as I argued before, that the history and the equities are different in that 25—

THE COURT: You need to stand up, Mr. Shaffer.

MR. SHAFFER: I'm sorry. I apologize.

The equities are different with respect to that 25-acre parcel because they clearly were working on that in late 1988. In fact, there's testimony during the liability phase that Mr. Lipps layed out the ditches in November of 1988, well after the Hobbs were on notice that there was some question on the part of the Corps of Engineers.

I would submit that the Court should order [37] injunctive relief which basically says they have to revegetate and plug the ditches in those parcels to allow it to revegetate to resume its status as wetlands.

THE COURT: But suppose they go in and plant hay on that? What is your position on that in terms of that being a violation of the law at this point?

MR. SHAFFER: Well, Your Honor, the planting of the hay is—you know, to the extent that they obviously have to go in and remove the fill and presumably are going to want to level the land, which means filling holes, which involves the discharge of fill, I would submit, Your Honor, that basically to allow them to farm that when they have not expended considerable amounts of money to bring it into cultivation or get it into shape really does give them a windfall.

THE COURT: Well, I haven't ruled on that parcel yet. Let me make it clear. That's the point I'm at now.

MR. SHAFFER: My concern is, Your Honor, I don't know the status of the land, but, presumably, they're going to have to fill holes, grade, level, in order to keep the water off so they don't ruin their crop. The sides of the ditches clearly haven't been seeded. I would submit, Your Honor, that further work on that site would constitute a violation in the absence of [38] a permit, and assuming they could do the work to get it in shape to cultivate it, you know, obviously, the statute deals with discharge of fill material, and spoil piles are sitting out there.

THE COURT: Was there any work in 1988 other than that field, that you know of?

MR. SHAFFER: My understanding is that that is the field or that is the collection of fields where they were doing the bulk of their work in 1988.

THE COURT: That's what I recall, too.

MR. SHAFFER: That's my understanding, and I can't cite the Court to any other parcels.

THE COURT: I can't recall from the testimony any other parcels in 1988.

All right, go ahead, Mr. Nageotte.

MR. NAGEOTTE: If Your Honor please—

THE COURT: Four minutes.

MR. NAGEOTTE: I can appreciate what the government is saying with regard to the 25-acre field. They're saying, well, you shouldn't—you know, community benefit. But, on the other hand, to take that approach is counterproductive to what the government is saying. If in fact we're dealing with the Clean Water Act and concern for water quality, the evidence is clear on the record of this case that the most efficient and [39] expeditious means to solve the water quality problem, which is clearly—

THE COURT: Let's don't argue about that. I'm not arguing on what's the most expeditious means to solve it, I'm arguing over the legal status.

In other words, the way I view my ruling is that I am not going to make a legal ruling on areas that are undisturbed upon which a jury has not concluded that there are any wetlands, specifically. And those are just like any other undisturbed wetlands, and the people will move at their peril on them. Their restoration plan calls for the land as is, including that parcel in transition. But we've got an erosion problem on that parcel, so we've got to decide what to do with it, whether I'm going to order that those ditches be plugged and that it be seeded or whether it be put into hay or what's going to be done with it, because the restoration plan I'm approving, basically, that you've proposed leaves the land as is until such time as they're going to put cattle on it. But it leaves the Court with that piece of property in transition, and I've got to decide now what to do with that property in transition.

And, frankly, neither one of you all have presented anything to me on what to do with the piece of property in transition, other than what Mr. Shaffer did [40] today. And that's my concern. And what I'm contemplating right now is giving you all 30 days to try to come up with something to do with that property and give the Court some type of information, some site-specific infor-

mation, as to what to do with these 26 acres here or 25 acres, whatever it is.

MR. NAGEOTTE: Well, I would submit to the Court that clearly what should be done, based on all the testimony that Your Honor has heard at the penalty phase, is to allow the Hobbs to finish that 25 acres and plant it with hay.

THE COURT: No, I'm not going to do that, Mr. Nageotte, because the jury found that in 1988 there was a violation. That's the only property that was involved in 1988, and the Court—I can leave it as is and the Hobbs can go apply for a permit on it, but I'm not going to now issue an injunction ordering you to plant the property into hay. That would be entirely inappropriate under the act to then say, all right, there's a violation there. What I'm doing is saying what's been done right now shows to the Court—you've been able to show no environmental detriment, but there's testimony before the Court that that piece of property as is may pose an environmental problem because of the erosion. And, so, we've got to decide what's to be done with it, and—

[41] MR. NAGEOTTE: First of all, if I could, with all due respect, clarify something Your Honor said.

The jury did not find that that piece of property was done in 1988 and was the subject of the ruling. Quite to the contrary. The jury—if you look at the stipulations, there was work on various properties in 1988 besides the 25-acre field. And, remember, the jury didn't pick which field or which property. The jury found that in 1988 Paul Hobbs discharged fill material into his wetlands property, which was more than one acre. They didn't say how many. So, we have the same problem with the 25-acre field.

THE COURT: All right. Then I'll tell you what we'll do, then. We'll take 30 days and you all can go do a wetlands delineation on the property. Because I've got to decide at the damages phase, and you can do a wetlands delineation on it, you can do a cost analysis of the

various uses and come up with alternative plans for that 26 acres. I don't know of any other way to do it at this point, unless you all can agree, which I'm not going to count on that.

MR. SHAFFER: Well, Your Honor, with all due respect, we submitted in the liability phase a delineation which covers that 25 acres. I mean, is the Court asking us to basically go back and redo everything [42] we did at the expense of the government?

THE COURT: No.

MR. SHAFFER: The Hobbs have presented no delineations, and I would hate to think that we have to go back and redo all of that.

MR. NAGEOTTE: Your Honor, what this boils down to is this, very frankly, and I appreciate the government's problem here, but I look at it this way:

If all the evidence in the case is that the ditching of the Hobbs when allowed to continue was okay, was excellent, as everyone has said, was done under the SCS supervision and that field was also at an expense, even though it's not completed, and that the hay fields of the Hobbs are environmentally acceptable, then it seems to me just to take the position, well, remember—it's like Your Honor said about the children; well, you can't do this because you just can't. Well, it's not doing any harm, and it would solve the problem. But, no, you can't do it, because you just can't. I just don't understand that.

I mean, my suggestion is simply to go ahead and finish that field off and let it—

THE COURT: How can you do it without a permit, unless you want to take the chance that it's not a wetlands?

[43] In other words, at this point, Mr. Nageotte, this is the factual situation with that piece of property. That particular work was continued after the EPA was out there in 1988. In October of 1988 the work on that property was continued. That's the only work that Mr. Paul Hobbs was doing in 1988 as a continuation of that piece

of property. So, that was being continued after the EPA went out there. My order today is basically the property is as it is. The forested wetlands are still subject to regulation if they're wetlands, and the property is as it is because there's no showing that it's environmentally unsound. And for all the reasons—and I'm not going to repeat everything I've said today, not just for that one reason.

All right. Your restoration plan and what the Court ordered then leaves that property just as it is. It leaves it in the same situation as the forested wetlands, basically. It is as it is. So, in order for—and it's growing back. I've looked at the pictures. The area is growing back.

So, one of three things can occur here. You all can try to get together and present to the Court some viable alternatives for that piece of property, or the Court can leave it as is with the Hobbs running the risk of whatever they do to it they're going to end up in a [44] new legal turmoil, or, number three, I can outright order them to go to the Corps and get a permit for that piece of property before proceeding any further.

Those are the three alternatives—or, number four, I can go with the government's plan—there are four alternatives—and say, go ahead and plug up the ditches and reseed that piece of property.

So, there are four alternatives. I've taken care of the forested areas, and I've taken care of the undeveloped areas, and if I do no more today I've basically taken care of that 25 acres.

I'm trying to give you all an opportunity to work this out so you don't end up back in court over your 26 acres. And they are the only four. I can go with the government's plan, I can leave it as is and they run the risk of whatever they do, the United States coming back again and saying, you needed a permit, or they can go on their own to apply for a permit, or I can order them to do it. There's nothing been presented to me in a restoration plan that says plant that area in hay. That wasn't part

of your plan. You didn't present that as part of your plan. Your whole testimony and evidence before me was based on the property as is right now. And I have no evidence before me whatsoever to go off and say, well, just go ahead and plant it in hay. I simply [45] don't have that evidence before me.

MR. SHAFFER: I might observe, Your Honor, that basically what Mr. Nageotte is proposing is to undo the very remedy which she sought from Judge Kellam. Judge Kellam in issuing his preliminary injunction clearly recognized that that 25-acre parcel was separate and told them not to do any work in it and recognized that the equities—

THE COURT: Absolutely.

MR. SHAFFER: And now they're saying we want even more than Judge Kellam would give us.

THE COURT: This is the way I'm going to leave it with you. We're not getting any further today. I've made my order clear.

You all have 30 days to presnt to the Court an order that sets forth the Court's ruling today on the restoration plan approved with modification.

Mr. Shaffer, by working on this order with Mr. Nageotte, you in no way waive any objection that you have to the Court's, A, not approving your plan and, B, you don't show any agreement in the ruling of the Court of adopting that restoration plan with modification. But I do require that the two of you submit to the Court an appropriate order setting forth the plan adopted with modification.

[46] And the reason I put it to you all to do is you're going to have to get together on this outfall structure and certain fencing configurations, and let's hope that you don't need the Court to sit with you to come up with an outfall structure. I'm hoping that you all can take care of those things from a scientific standpoint without court intervention and present that to the Court. That's what you're required to do.

I would request that you also get together and see if you can come up with some resolution for the 26-acre parcel. If you don't, my order is as it is, the property stays. In other words, I don't find that the government has presented an adequate plan for stopping the ditches on that parcel. I do not find that the defendants have presented one iota of evidence that planting hay on that property or any use other than its current use comports with their evidence. All their evidence was based on leaving it as is, which leaves the property as is, and, frankly, somebody would not be very smart to avoid applying for a permit to do any further work on it.

MR. NAGEOTTE: That's what I was going to suggest to Your Honor, if you could style that that we have 30 days to work out a plan for the 26 acres, and then in the event we are not successful in doing that [47] that the Hobbs are ordered to apply for a permit for the 26 acres.

MR. SHAFFER: Well, as long as it's clear that the application in and of itself does not predetermine the awarding of the permit.

THE COURT: Well, I'm not ruling on the awarding of the permit on that property.

MR. SHAFFER: If I can just ask for some clarification from the Court with respect to the areas that are developed.

It is not clear from what the Court indicated here today, one, whether or not this mitigation plan must be implemented now or when it should be implemented. Is the Court saying they have to implement the program now, or do they have to implement the program in and when they put cattle on the property? If they don't have to do it now, I think it's necessary that there be some reporting mechanism so the Court and EPA has some advance notice that their land use is going to change. Otherwise,—

THE COURT: I think that's a viable thing. Mr. Nageotte is shaking his head, some type of notification, and the ten-year maintenance and ten-year water quality

obviously run from the implementation time, not from the time of the order.

MR. NAGEOTTE: We have no objection to that.

[48] MR. SHAFFER: And I assume, Your Honor, similarly, until this plan is implemented and certified by the Court, they're not going to put cattle out there.

THE COURT: Until the Court enters a final order with this plan I don't think that—let's hope that the action isn't still ongoing. I don't think that's a possibility. The final order—once the order is presented it will be entered, and that will be controling.

MR. NAGEOTTE: And we certainly won't put any cattle on it until this is resolved.

THE COURT: As far as the Court is concerned, for all intents and purposes it is resolved.

You still have 30 days to work on these technicalities that Ms. Contula expressed a concern over, and I'm trying to take care of the United States' concern about the plan so that those are worked out. That's the only reason I'm giving the 30 days.

In addition, I'm hopeful that you all will be able to come up with something for the 26 acres. If you don't, then it is as it is, and anybody who does any work on it does it at their own risk of violating the law. And that's just the way it is. I mean, my order goes with you all's plans, which is what you've presented. And neither plan came up with anything other than yours [49] was, Mr. Nageotte, leave it as is, and that's what I'm confirming right now. And his was, plug the ditches, and that's what I rejected, at least at this juncture.

MR. NAGEOTTE: I'm sorry. I'm not sure we meant leave it as is, but I could see why Your Honor would have to take that position, so—

THE COURT: There is no evidence presented as to anything to do with it.

MR. NAGEOTTE: Except the evidence that shows the environmental benefits for water quality and the other needs, which—but that's true.

THE COURT: Well, those water quality tests were as it is.

All right, counsel, you have 30 days from today to present that to the Court, and I'm not going to even say if you run into any difficulty what to do, because I'm anticipating no difficulty whatsoever. I'm an optimist.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 89-327-N

S. PAUL HOBBS, *et al.*,
Plaintiffs and
Counterclaim Defendants,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants and
Counterclaimants.

JUDGMENT IN A CIVIL CASE

[Filed Aug. 23, 1990]

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict on liability on the counterclaim.

☒ Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered on damages.

IT IS ORDERED AND ADJUDGED that on the counterclaim:

1. Defendants Phillip Ray Hobbs and Dorothy V. Hobbs discharged fill material onto wetlands constituting waters of the United States in 1980, 1984, and 1985 without a permit in violation of Sections 301(a) and 404(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344(a).

2. Defendants S. Paul Hobbs and Donna M. Hobbs discharged fill material onto wetlands constituting waters of the United States in 1986, 1987, and 1988 without a permit in violation of Sections 301(a) and 404(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344(a).

3. Defendants Phillip Ray Hobbs and Dorothy V. Hobbs shall pay civil penalties in the amount of One Hundred Dollars ($100.00) within sixty (60) days from entry of this judgment, payable to the United States Treasury, in care of Craig B. Shaffer, United States Department of Justice, Post Office Box 23986, Washington, D.C. 20026-3986.

4. Defendants S. Paul Hobbs and Donna M. Hobbs shall pay civil penalties in the amount of Two Hundred Dollars ($200.00) within sixty (60) days from entry of this judgment, payable to the United States Treasury, in care of Craig B. Shaffer, United States Department of Justice, Post Office Box 23986, Washington, D.C. 20036-3986.

5. Use, modification, and/or restoration of the wetlands property involved in this action shall be in accordance with the court's ruling of May 21, 1990, and Final Order of August 22, 1990.

Date August 22, 1990

DORIS R. CASEY
Clerk

/s/ [Illegible]
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 89-327-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. PAUL HOBBS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on numerous post-trial motions filed by defendants in this case. On January 26, 1990, the jury found that defendants had discharged pollutants onto their wetlands property without first seeking a permit from the United States Army Corps of Engineers (hereinafter referred to as "Corps"), in violation of Section 301(a) of the Clean Water Act (hereinafter referred to as "CWA"), 33 U.S.C. § 1311(a). A bench trial was conducted on May 17, 18, and 21, 1990, to determine the appropriateness of ordering injunctive relief, in the form of restoration, and of imposing civil penalties.[1] The court issued its ruling regarding relief, restoration, and penalties from the bench on May 21, 1990, with a Final Order entered in the case on August 22, 1990. The following is a list of defendants' motions, with their filing dates, which are the subject of this opinion and order:

[1] On December 14, 1989, the court granted plaintiff's motion for bifurcation into separate trials on the issues of liability and damages.

(March 2, 1990)

Defendants Donna M. Hobbs and Dorothy V. Hobbs Motion for a New Trial;

Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial on behalf of S. Paul Hobbs and Donna M. Hobbs;

Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial on behalf of Phillip Ray Hobbs and Dorothy V. Hobbs;

(March 14, 1990)

Motion to Stay Entry of Final Judgment;

(June 26, 1990)

Motion for Judgment Notwithstanding the Verdict and to Partially Set Aside the Jury Verdict as Contrary to the Law and Evidence.

The court will consider each motion in the order indicated above.

Motion for a New Trial

In their motion, defendants Donna M. Hobbs and Dorothy V. Hobbs seek a new trial on the basis that the United States failed to present evidence that either defendant discharged a pollutant, a prerequisite to establishing a violation of the CWA. 33 U.S.C. § 1311(a).[2] Defendants' Donna M. Hobbs and Dorothy V. Hobbs' Motion for a New Trial, *United States v. Hobbs*, Civil Action No. 89-327-N, at 1-2 (E.D. Va. March 2, 1990). Defendants represent in their motion that the court found the two defendants could be liable for violating the CWA purely on the basis that they were co-owners of the sub-

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[2] Section 1311(a) provides "[e]xcept as in compliance with this section and section[ ] . . . 404 of this Act [33 U.S.C. § 1344], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

ject property with their spouses. *Id.* at 2-3. The court finds that defendants' motion lacks merit and incorrectly states the basis of the court's ruling.

Despite defendants' contention that no evidence was presented to establish liability, they stipulated to clearing, planting, and grubbing their property on numerous occasions. The Stipulation read: "Phillip Ray Hobbs *and Dorothy V. Hobbs* conducted the work on the parcels listed on the dates set as follows. . . ." Order on Final Pretrial Conference, *United States v. Hobbs*, Civil Action No. 89-327-N, at 3 (E.D. Va. January 4, 1990) (emphasis added) (hereinafter referred to as "Stipulation"). Likewise, the Stipulation with respect to defendant Donna M. Hobbs indicated: "S. Paul Hobbs *and Donna M. Hobbs* conducted the work on the parcels listed on the dates set out as follows. . . ." *Id.* at 4 (emphasis added). The Stipulation was presented to the jury in the court's preliminary instructions at the inception of trial and as part of the court's charge (Jury Instruction No. 4) at the close of the liability phase of the case. Clearly, the basis for each defendant's liability was not his or her status as a co-owner of the subject property, but rather liability rested on the evidence presented to the jury that each defendant engaged in various activities which constituted discharges of pollutants. *See also* Jury Instruction No. 21 (each defendant to be considered separately and individually by the jury). Defendants' moreover, made no objections to the court's preliminary instruction or the final jury instruction, each of which contained the Stipulation. Thus, for the reasons stated herein, the court DENIES defendants' motion for a new trial as being frivolous and wholly unsupported by the evidence.

Motions for JNOVs or New Trials

On March 2, 1990, defendants, S. Paul Hobbs and Donna M. Hobbs, and defendants, Phillip Ray Hobbs and Dorothy V. Hobbs, filed separate motions seeking

judgments notwithstanding the verdicts or, in the alternative, new trials. Because both motions raise the same seven issues, the court will discuss these motions together. The seven issues asserted by both motions are:

1. The Corps of Engineers is the sole permitting authority under the CWA;

2. The 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands and the 1988 Environmental Protection Agency (hereinafter referred to as "EPA") Wetland Identification and Delineation Manual violate the Administrative Procedure Act;

3. The court's Forms of Verdict are void;

4. The term "neighboring" incorporated into the definition of "adjacency," 33 C.F.R. § 328.3(c) is void for vagueness;

5. The court improperly failed to instruct the jury that man-dug, non-tidal drainage ditches are not waters of the United States;

6. The court improperly failed to instruct the jury on CWA Section 404(f) exemptions; and

7. The court erred in prohibiting defendants from presenting evidence as to their "good faith" belief that the order of compliance issued by the EPA was invalid.

S. Paul Hobbs and Donna M. Hobbs' Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial; Phillip Ray Hobbs and Dorothy V. Hobbs' Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial, *United States v. Hobbs*, Civil Action No. 89-327-N (E.D. Va. March 2, 1990) (hereinafter collectively referred to as "Motions for JNOVs").

In addition, defendant S. Paul Hobbs asserts a separate ground pertaining to the court's failure to instruct the jury on estoppel. S. Paul Hobbs and Donna M. Hobbs' Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial, *United States v. Hobbs*, Civil Action No. 89-327-N, at 59-66 (E.D. Va. March 2, 1990) (hereinafter referred to as "Paul Hobbs' Motion for JNOV" in regard to this one ground).

1. Permitting Authority

At the close of the government's case, defendants moved for a directed verdict on the basis that authority to issue Section 404 permits rests solely with the Corps. According to defendants, since the Corps never determined that defendants needed a permit, the EPA lacked all authority to make any jurisdictional determinations and to enforce the CWA itself. Motions for JNOVs at 5. Under defendants' theory, the EPA's enforcement authority comes into play only if the Corps has determined that the property is governed by the CWA and that a permit is required and has not been obtained, or that an existing permit has somehow been violated. This court, at the time of defendants' motions for directed verdicts (as well as numerous other occasions throughout this proceeding), heard oral arguments on this same ground and thoroughly read and considered the briefs submitted by both parties, together with the authorities cited at that time. The court, then, held that the EPA has independent authority to evaluate whether property is governed by the CWA. *See* Transcript, *United States v. Hobbs*, Civil Action No. 89-327-N (E.D. Va. January 17, 1990). Ruling from the bench, the court articulated both its reasoning and the various authorities relied upon in making its decision.

Defendants assert the same arguments previously set forth in support of their contention. In fact, two of the cases relied upon by defendants, *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315-16 (4th Cir. 1988),

and *Golden Gate Audubon Society, Inc. v. United States Army Corps of Engineers*, 700 F. Supp. 1549, 1552-53 (N.D. Cal. 1988), both support the court's decision. In both cases, the courts held that the citizen suit provisions of the CWA, 33 U.S.C. § 1365, authorize such suits against the Corps, even though the language of the provision only permits such suits against the EPA. *National Wildlife*, 859 F.2d at 316; *Golden Gate*, 700 F. Supp. at 1552. The Fourth Circuit stated:

> It is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms. The Corps has the nondiscretionary duty to regulate dredged or fill material, and to fulfill that duty it must make reasoned wetlands determinations. The Corps has a mandatory duty to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the law to the facts. *The EPA is ultimately responsible for the protection of wetlands.*

National Wildlife, 859 F.2d at 315-16 (emphasis added) (citations omitted).[3] The court, therefore, remains convinced that its previous rulings on this point are correct and defendants' Motions for JNOVs on this ground are DENIED.

2. Delineation Manuals

On January 2, 1990, defendants filed a motion for summary judgment or, in the alternative, partial summary judgment, alleging that various identification and delineation manuals utilized by EPA officials in making their wetlands evaluations are void in that they were not en-

[3] The court in *National Wildlife* went on to conclude that "Congress cannot have intended to allow citizens to challenge erroneous wetlands determinations when the EPA administrator makes them but to prohibit such challenges when the Corps makes the determination and the EPA fails to exert its authority over the Corps' determination." 859 F.2d at 316.

acted in compliance with the notice and comment provisions of the Administrative Procedures Act (hereinafter referred to as "APA"). Defendants' Motion for Summary Judgment or, in the alternative, Partial Summary Judgment, *United States v. Hobbs*, Civil Action No. 89-327-N (E.D. Va. January 2, 1990). After reviewing the motion and the memoranda of law filed by both parties, the court, on January 10, 1990, denied the motion, holding that compliance with the APA was unnecessary since the manuals aided agency officials in "interpreting" the dictates of the CWA and, therefore, were guidance materials rather than legislation.

The court reasoned that the parties were free to present jurisdictional determinations based on either the federal delineations manual, the EPA manual, or the Corps manual, since the jury was ultimately bound to evaluate the evidence in light of the regulatory definition of the term "wetlands." Indeed, the jury instruction recited verbatim the regulatory definition of the term "wetlands." Jury Instruction No. 19 (quoting 33 C.F.R. § 328.3(b)). The court also instructed the jury that the United States bore the burden of proving, by a preponderance of the evidence, every essential element of its case, which included proving that defendants' property constitutes jurisdictional wetlands. *See* Jury Instructions Nos. 11, 12, and 14. Thus, the court is unpersuaded by defendants' argument that by permitting testimony on the federal delineations manual, the court, for all practical purposes, granted a directed verdict for the United States. Defendants' Joint Memorandum in Support of Hobbs' Motions for Judgments Notwithstanding the Verdicts or in the alternative a New Trial, *United States v. Hobbs*, Civil Action No. 89-327-N, at 21-22 (E.D. Va. March 2, 1990). Consequently, finding no new matters presented for the court's consideration, and finding no error in the court's previous ruling on this issue, defendants' motions with respect to this ground are DENIED.

3. Forms of Verdict

Defendants claim that the Forms of Verdict submitted to the jury are void because the court used special interrogatories pursuant to Federal Rule of Civil Procedure 49(a), without requiring the jury to render a general verdict in the case. Motions for JNOVs at 29. When defendants first raised this objection, the court explained that the Forms of Verdict called for a jury determination on each issue of fact. Transcript, *United States v. Hobbs*, Civil Action No. 89-327-N, at 11 (E.D. Va. January 24, 1990) (hereinafter referred to as "January 24, 1990 Transcript"). Based on the jury's answers, the court would then enter a verdict under the law. The court did not abuse the wide discretion accorded to trial courts when employing special verdicts. *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 119 (4th Cir. 1964) ("The number and form of issues, *if they present the case fairly*, are matters resting in the *sound discretion* of the trial judge.") (emphasis in original). The CWA prohibits the discharge of a pollutant into waters of the United States without a permit. 33 U.S.C. § 1311(a). Based on the Forms of Verdict returned by the jury, they found that defendants' property is wetlands constituting a water of the United States, and that defendants discharged pollutants onto their wetlands property. Forms of Verdict, *United States v. Hobbs*, Civil Action No. 89-327-N (E.D. Va. January 26, 1990).

On January 24, 1990, defendants first objected to the Forms of Verdict because, while the Forms of Verdict did inquire into whether defendants discharged pollutants onto wetlands adjacent to waters of the United States, they did not ask whether defendants engaged in such activity "without a permit required from the United States Army Corps of Engineers." Motions for JNOVs at 32; January 24, 1990 Transcript at 11. At that time, the court indicated that the CWA requires a permit if there is a discharge of a pollutant onto waters of the United States. January 24, 1990 Transcript at 11. If the

jury found that defendants engaged in such activity, then as a matter of law a permit was required under the CWA, and defendants stipulated that they, in fact, had not obtained any permit. *Id.* There was no issue of fact for the jury to determine on this point. Therefore, for the reasons stated herein, in addition to those conveyed by the court at the time this objection was first raised, the court finds no merit in this objection.

Defendants further contend that the structure of the Forms of Verdict violates the Supreme Court's decision in *Tull v. United States*, 481 U.S. 412 (1987), since, according to defendants, the court was left to decide certain factual matters which should have been submitted to the jury. Motions for JNOVs at 41. Specifically, defendants criticize the Forms of Verdict for failing to require the jury to determine the date, the location, or the precise amount of the discharges. Motions for JNOVs at 41-43. The Supreme Court, in *Tull*, held that while there is a Seventh Amendment right to a jury trial for purposes of determining liability under the CWA when the United States seeks civil penalties, the trial court bears the responsibility of engaging in "highly discretionary calculations that take into account multiple factors" in order to assess civil penalties, if any. *Tull*, 481 U.S. at 427. All *Tull* requires is a general jury verdict on the issue of liability. In this case, defendants received more than a general verdict because Forms of Verdict were used. The jury's verdict specifically found discharges of pollutants by defendants at certain time periods onto wetlands, which were waters of the United States, thereby establishing liability. The Forms of Verdict were sufficiently detailed to comport with the evidence presented in the case.[4] The court then had suffi-

[4] The government's evidence was that all of defendants' property was wetlands constituting waters of the United States. *See infra* at 28-29. Defendants presented testimony that none of their property constituted wetlands. *See infra* at 29. Therefore, the jury could accept or reject these positions and either find wetlands or not. The court made it clear that the United States had the burden of

cient information from the jury to proceed with the penalty phase of the trial.

It was then the court's duty during the penalty phase of the trial to consider those factors, namely the amount and location of the discharges, in order to determine the type of restoration to be ordered and the amount of civil penalties to be imposed. The court allowed the parties a full opportunity to present evidence at the penalty phase of the trial on all relevant factors.[5]

For the reasons stated herein, the court finds that the jury determined all factual matters necessary to establish defendants' violations of the CWA in a manner wholly consistent with their Seventh Amendment rights as set forth in *Tull*. Thus, the court, hereby, DENIES defendants' motions with respect to this ground.

4. Adjacency

Defendants reassert in this ground an argument that has been revisited by this court in this case on numerous occasions. They maintain that the regulatory definition of the term "adjacency," 33 C.F.R. § 328.3(c), is void for vagueness unless the term "neighboring" utilized in the definition is given the same meaning as the terms "bordering" and "contiguous." Motions for JNOVs at 44. Defendants first raised this argument in one of their pretrial motions filed on January 2, 1990, and, then, asserted it again during the course of the trial and as an objection to the jury instructions. The court has consistently concluded that in light of the broad legislative intent of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the Act is to be applied

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proof on these issues. *See* Jury Instructions Nos. 11, 12, and 14. Further, the government's evidence of discharges was presented by years, and the court finds no deficiency in this level of specificity.

[5] For the most part, the parties simply relied on the evidence previously presented to the jury.

broadly under the Commerce Clause. *United States v. Whichard*, 20 Envtl. L. Rep. 1148, 1150 (1983) (citing *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1980)). Even the Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985), indicated that because of the sweeping authority contemplated by the CWA and the Corps' opinion with respect to the ecological interplay between waters and their adjacent wetlands, it was reasonable to conclude that "adjacent wetlands may be defined as waters under the Act." Accordingly, for the reasons herein and those recited throughout this proceeding, the court finds that the defendants' void for vagueness argument lacks merit and does not constitute a basis for granting defendants' motions, which are DENIED on this ground.

5. Drainage Ditches

The court instructed the jury that the phrase "waters of the United States" meant waters which at some point in time, either past, present or future, had been or may be used in interstate or foreign commerce. Jury Instruction No. 18. Wetlands adjacent to these waters are included in the definition of "waters of the United States" and subject to the CWA. *Id.* Defendants, at numerous times throughout this case, have alleged that even if their property does constitute wetlands, the wetlands are adjacent to man-dug, non-tidal drainage ditches originally excavated on dry land and, therefore, not a water of the United States.[6]

Assuming that the ditches were man-made,[7] the definition of the term "adjacent" expressly includes wetlands

[6] Defendants filed a motion for summary judgment, on November 3, 1990, on this point, which was denied by the court on December 14, 1990. Defendants also moved for a directed verdict with respect to this issue, which the court denied. Finally, defendants proffered a jury instruction concerning the ditches, which the court refused.

[7] Plaintiff maintains that "what the Hobbs claimed are man-made ditches are actually natural tributaries which have been improved

separated from other waters of the United States by man-made structures: "Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c). Courts have consistently found jurisdictional wetlands to exist, even when the connection between the wetlands area and the adjacent tidal waters is artificial or man-made. *See United States v. Ciampitti*, 583 F. Supp. 483, 494 (D.N.J. 1984), *aff'd*, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (In light of the legislative and regulatory history of the CWA, jurisdictional wetlands may exist even though they may have been artificially created. "[F]ederal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands."); *United States v. Akers*, 651 F. Supp. 320, 321-23 (E.D. Cal. 1987) (Statutory and administrative definitions of "waters" and "wetlands" are broad enough to include artificially-created wetlands because regulatory langauge "emphasizes the nature of the land in question, not the manner by which it might have reached its wetland state."); *Track 12, Inc. v. District Engineer, United States Army Corps of Engineers*, 618 F. Supp. 448 (D.C. Minn. 1985) (Corps had jurisdiction of artificial wetland created by actions of state and local authorities, including construction of a highway and a storm sewage system).

Defendants' contention includes an assumption that the ditches which existed on the property prior to their ownership of the land were dug on dry land. Defendants' own witness, Mr. Rudy Nuttall, a life-long resident of the Ware Neck area, testified that the area was a swamp and that one needed rubber boots when on the defendants'

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by man." United States' Memorandum in Opposition to Motions for Judgments Notwithstanding the Verdicts or in the alternative for a New Trial, *United States v. Hobbs*, Civil Action No. 89-327-N, at 15 (E.D. Va. March 14, 1990).

property because the area was extremely wet. In any event, the jury heard testimony from both parties describing the location and the characteristics of defendants' property and the pattern of drainage ditches across the property. The court fully instructed the jury on the definitions of waters of the United States, wetlands, and adjacency. Jury Instructions Nos. 18, 19, and 20. The jury then determined that defendants' property is, indeed, a wetlands. For the reasons stated from the bench, as well as those stated herein, the court DENIES defendants' Motions for JNOVs with respect to this ground.

6. Statutory Exemptions

Defendants contend that the court incorrectly refused to include their proposed jury instruction concerning the CWA's Section 1344(f) exemptions from the permitting process. Motions for JNOVs at 51.[8] Specifically, defendants maintain that they engaged in silviculture and in the construction of forestry roads, farm ponds, and drainage ditches. *Id.* at 51-52, 54. Title 33 U.S.C. § 1344 (f)(1) provides exemptions from the permitting process for discharges onto wetlands which result from normal agricultural activities. The exemptions set forth in Section 1344(f)(1) are subject to 33 U.S.C. § 1344(f)(2) (emphasis added) which provides:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose *bringing an area of the navigable*

[8] The court concluded that defendants' proffered jury instructions overall were extremely verbose, cumbersome, and confussing, because they included matters not in issue and contained lengthy, unnecessary statements of the law. The jury instruction proffered on statutory exemptions is a good example of this over-inclusion of items not in issue in any respect in the lawsuit, such as reconstruction of dikes, dams, levees, etc. *See* Defendants S. Paul Hobbs, Donna M. Hobbs, Philip Ray Hobbs and Dorothy V. Hobbs' Proposed Jury Instructions, *United States v. Hobbs*, Civil Action No. 89-327-N, at Jury Instruction F (E.D. Va. January 2, 1990).

> *waters into a use to which it was not previously subject*, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, *shall be required to have a permit*. . . .

Section 1344(f)(1) has consistently been construed narrowly. *See United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir. 1985), cert. denied, 474 U.S. 817 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 n.44 (5th Cir. 1983). At trial, defendants testified that they purchased the property for growing hay and for raising cattle. They engaged in clearing, grubbing, and planting activities in order to achieve their goals. *See* Stipulation; Jury Instruction No. 4.

Defendants' contend that they engaged in silviculture activity exempt from the permit requirement pursuant to Section 1344(f)(1)(A). According to the regulations issued by the Corps for implementing that section, silviculture qualifies for the exemption only if it is a part of an *established* operation. 33 C.F.R. § 323.4(a)(1)(ii) (emphasis added). "Activities which bring an area into . . . silviculture . . . use are not part of an established operation." *Id.* Defendants cleared timber in order to convert the property into hay fields and pasture land. In *United States v. Larkins*, 852 F.2d 189, 192 (6th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 1131 (1989), defendants argued that their actions were exempt under Section 1344(f)(1)(A) by claiming that their land was used for silviculture, even though they planted crops after the trees had been removed rather than replanting the property with trees. The court concluded that defendants were not entitled to the exemption since "33 U.S.C. § 1344(f)(1)(A) applies to the *normal* harvesting of timber, not to the activitiy of clearing timber 'to permanently change the area from wetlands into non-wetland agricultural tract. . . .'" *Id.* (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*,

715 F.2d 897, 926 n.46 (5th Cir. 1983) (citation omitted) (emphasis in original). Accordingly, defendants' in the case at bar were clearly not entitled to the exemption provided by Section 1344(f)(1)(A).

Next, defendants claim that their construction of forestry roads is also exempt pursuant to 33 U.S.C. § 1344 (f)(1)(E). Both the statute and the Corps' regulations require that such roads be constructed and maintained consistent with best management practices ("BMPs") in order to avoid the need for a CWA permit. *See* 33 U.S.C. § 1344(f)(1)(E); 33 C.F.R. § 323.4(a)(6). Defendants never proffered any evidence that the forestry roads were constructed in accordance with BMPs, nor do they make any such allegation in their motions presently before the court.

The farm pond constructed by defendant Phillip Hobbs was built to serve as a watering area for cattle grazing on the property. By constructing the pond, defendants cleared that portion of the property in order to bring the area into a use to which it had not previously been subject. 33 U.S.C. § 1344(f)(2). Therefore, defendants' actions relating to construction of the farm pond were not exempt from the provisions of the CWA.

Defendants' suggest that their ditching activity resulted in "minor drainage" of the property in an effort to qualify for the statutory exemption contained in Section 1344(f)(1)(A). According to 33 C.F.R. § 323.4 (a)(1)(iii)(C)(2), "[m]inor drainage . . . is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland . . . or conversion from one wetland use to another (for example, silviculture to farming)." The uncontroverted evidence was that defendants cleared the land and then dug drainage ditches in order to remove excess water from the prop-

erty, all to establish hay fields and grazing areas on the land. The discharges of pollutants associated with their ditching activity is, therefore, not exempt pursuant to Section 1344(f)(1)(A).

Finally, defendants assert that the jury should have been given the opportunity to decide whether "the flow or circulation of navigable waters may be impaired or the reach of such waters . . . reduced. . . ." by their actions taken on the subject property. 33 U.S.C. § 1344 (f)(2). The Corps' regulations set forth that "[w]here the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration." 33 C.F.R. § 323.4(c). The regulations further state the following specific example: "a permit will be required for . . . the conversion of a wetland . . . to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of . . . drainage ditches or other works or structures used to effect such conversion." *Id.* The evidence clearly showed that the defendants engaged in extensive clearing and construction activities, including drainage ditches, on the subject property to convert it to an agricultural use. Therefore, under the regulations, it is presumed that the discharges of pollutants resulting from those activities have impaired the flow or circulation of waters of the United States, thereby not entitling defendants to the exemption in § 1344(f)(2). Defendants presented no evidence to the contrary to rebut this presumption, and it would have been error for the court to instruct the jury on this statutory exemption.

For the foregoing reasons, the court DENIES defendants' Motions for JNOVs on this ground because their proposed jury instruction on statutory exemptions under the CWA was properly refused as unsupported by the evidence.

7. Good Faith Belief

Defendants challenge the court's refusal to permit presentation of evidence concerning defendants' good faith belief that the EPA's order for compliance was invalid. They maintain that such evidence was a valid defense to their violation of that order and, therefore, they were denied due process of law. In their motions, defendants articulate eight separate occasions in which they raised this same objection. Motions for JNOVs at 54-57. In each instance, the court concluded that failure to comply with an order for compliance issued by the EPA is governed by a *strict liability standard*. 33 U.S.C. § 1319(d);[9] *see United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) ("The regulatory provisions of the [CWA] were written without regard to intentionality, however, making the person responsible for the discharge of any pollutant strictly liable."); *Connecticut Fund for the Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1409 (D. Conn. 1987) ("Under the [CWA], compliance is a matter of strict lability and a defendant's intention to comply or good faith attempt to do so does not excuse a violation."); *United States v. Bradshaw*, 541 F. Supp. 884, 886 (D. Md. 1982) (cessation of activity upon notice of possible violation irrelevant for purposes of CWA, since Act is a strict liability statute).

While defendants' good faith belief was irrelevant for purposes of determining liability, their intent was a proper consideration for the court, not the jury, in determining the amount of civil penalties to be imposed. 33 U.S.C. § 1319(d);[10] *United States v. Tull*, 481 U.S.

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[9] 33 U.S.C. § 1319(d) provides in pertinent part: "any person who violates any order issued by the Administrator [of the EPA] under subsection (a) of this section, *shall* be subject to a civil penalty. . . ."

[10] 33 U.S.C. § 1319(d) states in relevant part: "[i]n determining the amount of a civil penalty the court *shall* consider . . . any good-faith efforts to comply with the applicable requirements. . . ." (emphasis added).

412, 425-27 (1987). Indeed, the court did take into account defendants' actions upon receipt of the EPA's original order for compliance, and the amended order, in fashioning a remedy for their violations, as reflected in the court's ruling from the bench on May 21, 1990. Therefore, the court once again, for the reasons previously stated, DENIES defendants' motions on this point.

8. Estoppel

Defendant S. Paul Hobbs renews his objection to the court's refusal to include a jury instruction on estoppel. *See* Paul Hobbs' Motion for JNOV at 59-66. The Supreme Court has not decided precisely what type of conduct is necessary to estop the federal government, including whether "affirmative misconduct" will suffice. *See Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) ("This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations . . . whether even 'affirmative misconduct' would estop the Government. . . ."); *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984) (party asserting estoppel against the government must demonstrate reasonable reliance to his detriment).

The Fourth Circuit, in *Zografov v. V.A. Medical Center*, 779 F.2d 967, 969-70 (4th Cir. 1985), denied plaintiff's request for relief by way of estoppel because he failed to demonstrate affirmative misconduct on the part of EEOC officials. The court held: "[P]laintiff has made no showing of affirmative misconduct on the part of the government, which is the least the court would require, even if that would suffice, to rely upon estoppel." *Id.* at 969 (citing *Hansen*, 450 U.S. at 788). The holding in *Zografov* was confirmed in *Johnson v. Burnley*, 887 F.2d 471, 473, 479 (4th Cir. 1989), when the court stated that in order to invoke the doctrine of equitable estoppel, plaintiff, a former employee of the U.S. Coast Guard,

would have to demonstrate, "at the very least, 'affirmative misconduct on the part of the government.'" *Id.* at 479 (quoting *Zografos*, 779 F.2d at 969). The court went on to characterize plaintiff's burden as a "stringent" one. *Id.*; *see United States v. Tull*, 615 F. Supp. 610, 624-25 (E.D. Va. 1983), (CWA/"wetlands" case requiring at least affirmative misconduct by government to invoke estoppel against it), *aff'd*, 769 F.2d 182, 187-88 (4th Cir. 1985), *rev'd on another ground*, 481 U.S. 412 (1987).

Therefore, defendant Paul Hobbs was required to demonstrate both affirmative misconduct on the part of Mr. Lipps and Mr. Hawkins, employees of the Soil Conservation Service (hereinafter referred to as "SCS"), and reasonable reliance on their conduct in order to succeed in estopping the government from enforcing the CWA against him. While both Mr. Lipps and Mr. Hawkins testified that they did not believe the property contained wetlands, they also indicated that they never made any representations to defendant concerning regulated wetlands, nor did they have the authority to make jurisdictional determinations. Their purpose on the property was to design, layout, and oversee defendant's construction of the drainage ditches. Defendant points to an alleged failure on the part of either Mr. Lipps or Mr. Hawkins to comply with SCS regulations requiring notice to the Corps of the proposed activity as constituting affirmative misconduct. Paul Hobbs' Motion for JNOV at 64-65. To the extent that SCS policies were not complied with, such inaction on the part of either Mr. Lipps or Mr. Hawkins does not rise to the level of affirmative misconduct.[11] The SCS employees' conduct did not inhibit de-

[11] In *Schweiker v. Hansen*, 450 U.S. 785, 786 (1981), a Social Security Administration employee failed to advise respondent to file a written application, since she was uncertain as to her eligibility for social security benefits, in violation of the Claims Manual, an internal administration handbook, which provides instructions for advising applicants. The Court found that while the employee did not follow the manual, such conduct did not rise to the level of affirmative misconduct. *Id.* at 788-89.

fendant from inquiring into whether other permits were required for the work he was conducting and planning to conduct on the property. *See Hansen*, 450 U.S. at 789. Thus, the court finds that its ruling from the bench on estoppel was correct and DENIES defendant's motion for JNOV or, in the alternative, a new trial on this issue.[12]

Motion to Stay Entry of Final Judgment

On March 14, 1990, defendants filed a Motion to Stay Entry of Final Judgment pending the Fourth Circuit Court of Appeals decision in *Southern Pines v. United States*, Civil Action No. 89-453-N (E.D. Va. August 11, 1989), *appeal docketed*, No. 89-1790 (4th Cir. August 26 or 28, 1989). Motion to Stay Entry of Final Judgment, *United States v. Hobbs*, Civil Action No. 89-327-N (E.D. Va. March 14, 1990) (hereinafter referred to as "Motion to Stay"). This court relied, in part, on *Southern Pines* to dismiss Counts 1, 2, and 3 of defendants' complaint. Memorandum Opinion and Order, *Hobbs v. United States*, Civil Action No. 89-327-N, at 4-8 (E.D. Va. March 29, 1990).[13] In those counts, defendants sought

[12] Finding no affirmative misconduct, the court need not address further at this juncture reasonable reliance by Paul Hobbs. The court did address this point during the course of the jury trial and related motions.

[13] Originally, on April 25, 1989, defendants herein filed a complaint challenging the EPA's Findings of Violation and Order for Compliance issued against them. In turn, on June 23, 1989, plaintiff herein filed a counterclaim charging defendants herein with violating Section 301(a) of the CWA, 33 U.S.C. § 1311(a). This court, on December 14, 1989, dismissed counts 1, 2, and 3 of the complaint for lack of subject matter jurisdiction and granted partial summary judgment with respect to count 4 of the complaint. Because no portion of the original complaint survived, the counterclaim became the only cause of action in this suit, thereby making the United States the plaintiff and the Hobbses the defendants. These rulings were subsequently set forth in writing in the court's Memorandum Opinion and Order, filed March 29, 1990, as cited herein.

pre-enforcement review of the compliance order requiring them to cease and desist discharging pollutants onto wetlands and to contact the EPA for the purpose of devising a restoration plan, issued by the EPA pursuant to 33 U.S.C. § 1319(a)(3). *Id.* at 1-2. Relying principally on the Supreme Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the court concluded that the enforcement provisions of the CWA do not provide a cause of action for challenging compliance orders prior to their being enforced by the EPA. *Id.* at 7. Therefore, judicial review of a compliance order occurs only when the EPA seeks enforcement in district court. *Id.* at 8.

Defendants argue that staying the final judgment in this case is appropriate because, if *Southern Pines* is overturned on appeal, the court should retain jurisdiction to consider motions defendants are certain to file. Motion to Stay at 3. Apparently, the thrust of these motions will be to seek a new trial because defendants were barred from introducing evidence that they challenged the validity of the EPA's exercise of jurisdiction over their property and that a preliminary injunction had been entered on their behalf at an earlier stage in the proceedings. Memorandum in Support of Hobbs' Motion to Stay Entry of Final Judgment Order, *United States v. Hobbs*, Civil Action No. 89-327-N, at 3 (E.D. Va. March 14, 1990) (hereinafter referred to as "Motion to Stay Memorandum").[14]

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[14] Specifically, defendants maintain that should *Southern Pines* be overturned:

> [They] will have been substantially and irreparably prejudiced and denied their constitutional right to a fair trial. By dismissing [defendants'] complaint in this action, this Court required [defendants] to appear solely as Defendants to the Government's Complaint, prevented the introduction of any evidence on behalf of [defendants] concerning this Court's Order of Preliminary Injunction entered July 5, 1989 which

The court concludes that defendants' reasons for seeking a stay lack merit. Counts 1, 2, and 3 of defendants' complaint pertained solely to pre-enforcement review of the compliance order issued by the EPA. Complaint, *Hobbs v. United States*, Civil Action No. 89-327-N, at 15-20 (E.D. Va. April 25, 1989). Defendants sought pre-enforcement review of the compliance order because they questioned the propriety of the EPA's assertion of jurisdiction over their property as being wetlands adjacent to waters of the United States. *Id.* On January 26, 1990, a jury determined that defendants' property is wetlands adjacent to waters of the United States and, therefore, subject to Corps and EPA regulation. Defendants conceded at trial that they did not comply with the order, since they did not submit a restoration plan, however they did cease activity proscribed by the compliance order. Therefore, even if the Fourth Circuit determines that pre-enforcement judicial review of EPA orders to compliance is contemplated by the CWA, defendants would have been correct on the law, but their argument herein for staying entry of final judgment will have been rendered moot since the jury found them in violation of the CWA. Any error would be harmless at this point.

Defendants maintain that the court's actions in reliance on *Southern Pines* prejudiced their position in front of the jury because they appeared at trial as defendants, defending the characterization of their property as being wetlands, rather than appearing as plaintiffs, actively challenging the validity of the EPA's assertion of jurisdiction. Motion to Stay Memorandum at 3. This argument makes little sense, considering that as defendants they had no burden of proof and that the burden of proof was on the United States in this case. Specifically, this

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> denied [defendants] a defense to Count II of the Government's Complaint, and denied [defendants] a right to a fair trial.

Motion to Stay Memorandum at 3.

court instructed the jury that plaintiff bore the burden of proving every essential element of its claim by a preponderance of the evidence, and that it bore this burden with respect to each defendant. Jury Instructions Nos. 11 & 21. In each of the two instructions, the court advised the jury that failure on the part of the United States to prove its case would result in a finding for the defendants, and that each defendant must be examined separately and individually for purposes of determining liability. *Id.* Therefore, the court remains unconvinced that defendants were prejudiced by being defendants, rather than plaintiffs, in the instant case.

Defendants also contend that should *Southern Pines* be reversed, they will seek a new trial on the basis that they were prevented from introducing into evidence an Order of Preliminary Injunction issued by this court. Motion to Stay Memorandum at 3. According to defendants, the Order of Preliminary Injunction constituted a defense to the United States' allegation, in Count II of its counterclaim, that the Hobbs failed to comply with the EPA's order for compliance. *Id.* The court did preclude introduction of this evidence because it was irrelevant for purposes of determining defendants' liability for activity not protected by the injunction, not because, as contended by defendants, the court found that defendants were not entitled to pre-enforcement review of the compliance order. *See* Order on Final Pretrial Conference, *United States v. Hobbs*, Civil Action No. 89-327-N, at 37 (E.D. Va. January 4, 1990).

The Order of Preliminary Injunction permitted the Hobbs to continue normal farming operations in the fields which were already in production. Order of Preliminary Injunction, *Hobbs v. United States*, Civil Action No. 89-327-N, at 5 (E.D. Va. July 6, 1989) (hereinafter referred to as "preliminary injunction").[15] Defendants

[15] The United States stipulated that the Hobbs should be allowed to cut the hay already growing at the time the compliance order was issued. *Id.*

were not prejudiced by the court's decision to deny admission of the preliminary injunction into evidence because the United States only sought civil penalties for failure to comply with the order for compliance prior to May 4, 1989, the date on with the court heard arguments with respect to the Hobbs' request for a preliminary injunction. Answer and Counterclaim, *Hobbs v. United States*, Civil Action No. 89-327-N, at 18 (E.D. Va. June 23, 1989); *see* Preliminary Injunction at 1. Consequently, the court's exclusion of this evidence will remain proper regardless of the Fourth Circuit's disposition of the decision in *Southern Pines*.[16]

For the reasons stated herein, the court DENIES defendants' Motion to Stay Entry of Final Judgment pending appeal to the Fourth Circuit of the district court's decision in *Southern Pines*.

Second Motion for JNOV

On June 26, 1990, defendants filed a second motion for judgment notwithstanding the verdict alleging that the court lacks jurisdiction over the twenty-five acre parcel of property in transition from forested property to agricultural land. Motion for Judgment Notwithstanding the Verdict and to Partially Set Aside the Jury Verdict as Contrary to the Law and Evidence, *United States v. Hobbs*, Civil Action No. 89-327-N, at 1 (E.D. Va. June 26, 1990) (hereinafter referred to as "Second Motion for JNOV"). Defendants maintain that the evidence presented at trial does not support the jury's finding, which includes parcels 105, 105A, and 106A, that the

[16] Counsel for defendants repeatedly attempted to mischaracterize this court's Order of Preliminary Injunction as a ruling by this court that the defendants' activities on the property were proper and legal. However, this court did not address the merits of the claims but merely granted an injunction to allow the defendants to continue their farming activity until their liability was determined in the underlying suit. Their liability has now been determined by the jury.

subject property constitutes jurisdictional wetlands. *Id.* On the contrary, two of the government's expert witnesses, Charles A. Rhodes, Jr., and Gary Frazer, testified that the entire subject property constituted jurisdictional wetlands. Their testimony specifically discussed the parcels in question, as well as other segments of the property. Moreover, their testimony was supplemented by photographs and diagrams illustrating the work performed on the property, the condition of the property, and the wetlands delineations conducted by government officials. Defendants' offered the testimony of their expert, Dr. James A. Reed, Jr., who supported their position that the property, including the field in transition, did not meet the regulatory definition of wetlands. He described and demonstrated the method by which he arrived at his conclusion. The jury had ample opportunity to consider and evaluate the witnesses and the evidence presented by both parties. It rendered a verdict which is supported by the evidence and which is reasonable in light of the evidence. Therefore, it would be error for this court to grant defendants' motion on this ground.

Additionally, defendants raise the following two contentions already asserted in their first motions for JNOV: the federal delineation manual is violative of the APA and the regulatory definition of "adjacency," 33 C.F.R. § 328.3(c), is void for vagueness. *See supra* at 4. Having addressed both issues numerous times throughout the course of this litigation, and again herein, the court DENIES defendants' motion with respect to these issues for the reasons stated from the bench and those stated herein. *See supra* at 7-8, 11-12.

Sanctions

In its response to defendants' Second Motion for JNOV, the United States asks this court to sanction counsel pursuant to Federal Rule of Civil Procedure 11. United States' Memorandum in Opposition to Defendant S. Paul

Hobbs' Motion for Judgment Notwithstanding the Verdict and to Partially Set Aside the Jury Verdict, *United States v. Hobbs*, Civil Action No. 89-327-N, at 9-13 (E.D. Va. July 10, 1990) (hereinafter referred to as "Motion for Sanctions"). Plaintiff characterizes defense counsel as having a "propensity for rehashed legal arguments and factual inadequacy." *Id.* at 11. Frankly, such characterization is kind. This court has been besieged with voluminous and repetitive, and often times frivolous, motions and objections throughout this litigation. For example, the contention that the EPA lacks jurisdiction to enforce the CWA until the Corps determines whether a permit is required has been raised and ruled upon at least five (5) times in this case (prior to trial, at least twice during trial, on motion for directed verdict, and on post-trial motions); the contention that the wetlands delineation manuals are void because of non-compliance with the APA has been raised and ruled upon at least four (4) times thus far (prior to trial, at trial, twice post-trial); the contention that the term "adjacency" is void for vagueness has been addressed at least four (4) times (pre-trial, at trial, as an objection to jury instructions, and post-trial); the assertion that the property is not a water of the United States because, if wetlands, it is adjacent to man-dug, non-tidal drainage ditches has been raised and ruled upon four (4) times (pre-trial, on motion for directed verdict, as an objection to jury instructions, post-trial); and in their post-trial motions, the defendants mention eight (8) different times they have raised the argument that they should be able to present evidence of their good faith non-compliance with the EPA Order. Motions for JNOVs at 54-57; *see supra* at 19. These examples are merely illustrative of the repetitious motions and objections made in this case by defendants' counsel and are in no way a comprehensive list of the abuses.

Although the court DENIES the Motion for Sanctions at this time, the court will not tolerate any further re-

petitive motions and objections, absent new legal authority or evidence, which with due diligence could not have been obtained at the time of the previous filings, motions, and objections.[17] Any further improper, repetitive motions will be subject to scrutiny under Rule 11 of the Federal Rules of Civil Procedure, and defense counsel is so put on notice. *These repetitive motions serve no purpose other than to increase the cost of this litigation.* If defense counsel is of the opinion that the court is incorrect in its rulings and orders, then the proper recourse at this juncture is appeal, not repetitive filings.

It is so ORDERED.

The Clerk is DIRECTED to mail a copy of this Memorandum Opinion and Order to counsel for plaintiff, Craig B. Shaffer, Esquire, Michael A. Rhine, Assistant United States Attorney, David A. Carson, Esquire, Ellen C. Teplitsky, Esquire, and Frances Higgins, Esquire; and to counsel for defendants, Richard R. Nageotte, Esquire.

/s/ Rebecca Beach Smith
United States District Judge

Norfolk, Virginia

August 24, 1990

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[17] The court also notes that some of these motions and arguments are contrary to settled law and have been raised repeatedly and finally ruled upon in other CWA/"wetlands" cases involving this same defense counsel. *See United States v. Tull*, 615 F. Supp. 610 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *rev'd on one ground*, 481 U.S. 412 (1987) (Court held right to jury on issue of liability under CWA).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 89-327-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. PAUL HOBBS, and DONNA M. HOBBS, his wife,

and

PHILLIP RAY HOBBS, and DOROTHY V. HOBBS, his wife,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

January 24, 1990

TENTH DAY

Before: THE HONORABLE REBECCA BEACH SMITH, Judge

* * * *

[2133] THE COURT: All right.

Mr. Nageotte, let me hear from you on the form of verdict.

MR. NAGEOTTE: Your Honor, first of all, we would ask the Court to include in all of the—in number 3—[2134] well, in all of the paragraphs on both Phillip Ray Hobbs and Paul Hobbs and his wife's form of

verdicts, the language "without a permit required from the United States Army Corps of Engineers."

You have to have—let me give you this scenario. Assuming the jury finds that a permit is not required, or that there was no requirement of a permit, then how can they be guilty of violating the Clean Water Act, because the Clean Water Act says it is a violation of the law to discharge without a permit.

THE COURT: No, if they decide there was a discharge of a pollutant onto wetlands, the laws says you have to have a permit. And there is no issue that they were without a permit, and we went through that before.

I mean the law says if you discharge a pollutant onto wetlands—and I'm not going to go through how it is waters of the United States—that you need a permit.

So there is no question that if they did all these other things, they needed a permit, and there is no issue of fact that they had a permit. You have stipulated to the Court yesterday.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 89-327-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. PAUL HOBBS, and DONNA M. HOBBS, his wife,

and

PHILLIP RAY HOBBS, and DOROTHY V. HOBBS, his wife,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

January 17, 1990

FIFTH DAY

Before: THE HONORABLE REBECCA BEACH SMITH, Judge

* * * *

[1152] THE COURT: All right.

MR. NAGEOTTE: Your Honor, at this time the defendants make a motion for a directed verdict in this case in accordance with the Federal Rules of Civil Procedure, the government having rested.

* * * *

[1159] THE COURT: Well, let's just assume, for instance, for a moment that the Corps of Engineers didn't do what it was supposed to do under the regs. Assume for

purposes of your argument. That doesn't nullify the EPA's enforcement powers. I mean, that the Army Corps of Engineers under their regulations don't do what they are supposed to do—how would that nullify the enforcement authority under the Clean Water Act given the Environmental Protection Agency?

MR. NAGEOTTE: Because, Your Honor, we do not question that the EPA has enforcement authority. The problem here is that EPA is not understanding the difference between enforcement authority and permitting authority.

[1160] THE COURT: Well, but maybe you are not understanding the difference between jurisdiction and permitting authority. If the EPA has equal enforcement powers under the Clean Water Act, they also have an ability to make a jurisdictional determination under that act, and the case law supports they do.

I have read both of your memoranda, by the way. I have read yours, Mr. Nageotte, and I have read that submitted by Mr. Carson. And the case law would indicate that the EPA not only has equal enforcement powers, but they can make an independent determination of jurisdiction, and if there is a conflict as between the EPA and the Army Corps of Engineers, that the EPA's determination controls.

And what I don't understand in your argument is what I think is being confused here, is whether they have jurisdiction, and that is being confused with the permitting authority. And somehow you are arguing that because the Army Corps of Engineers has not gone through a permitting process, that that then precludes the EPA's jurisdiction, enforcement jurisdiction.

MR. NAGEOTTE: Your Honor, let me say this. Upon careful reading of all the cases involved in Clean Water Act enforcements, I will tell Your Honor that I have yet to read a case which holds that the EPA can enforce if the Corps has not already issued a cease and desist order. What the [1161] government seeks for you—

THE COURT: You are telling me there is not a case in the body of case law out there that every time the EPA has come in to enforce, there has already been a cease and desist order by the Corps?

MR. NAGEOTTE: Yes, Your Honor, of the cases we have read, we have not been able—

THE COURT: You didn't cite any to me. I would like to see them. None of them were cited in your brief.

MR. NAGEOTTE: Well, the—

THE COURT: You tell me what they are, because I certainly didn't see them in your briefs.

MR. NAGEOTTE: Every case cited to Your Honor in the government's memorandum, and I think the case that we cited, which was the—

THE COURT: You cite one case in your brief.

MR. NAGEOTTE: That one case we cited, that is Washburn's case from San Francisco.

THE COURT: Two, *Alameda*, but that was the same one cited by the government.

Then *Newport Galleria.*

MR. NAGEOTTE: Right. Those cases, Your Honor, all had a Corps of Engineers cease and desist order.

You see, it is my view that—

THE COURT: Well, I think it is your view, because [1162] I have gone back—after my comments the other day, I spent a lot of time going back through the statute, and I think perhaps it is an argument, and it is your view, but I don't think it is the statutory scheme that has been set up.

MR. NAGEOTTE: Well, Your Honor, it precisely is the statutory scheme, for this reason. Congress, while they gave the Corps and the EPA enforcement authority —we don't argue the EPA doesn't have enforcement authority—they gave in 404 only the Corps permitting authority. The EPA has no permitting authority.

THE COURT: What if nobody ever applies for a permit? It is not up to the Corps or the EPA to go out

and make people apply for a permit, if in fact there was a scheme anticipated where people come in and apply for permits.

So what if someone never applies for a permit? And that's what happened here. Nobody ever applied for a permit at all, and the EPA has come in under their enforcement authority. They have made a jurisdictional determination that there are wetlands and waters of the United States involved, and consequently they need to enforce under the Clean Water Act, and now basically we are at a situation where it is up to the jury.

I mean we have gone past the permitting process. It is up to the jury to determine either, A, they need a [1163] permit or they don't need a permit. It is not even up to the Corps anymore, because the jury is going to determine that there are wetlands involving waters of the United States, that they are wetlands as waters of the United States or wetlands adjacent to waters of the United States, and once the jury decides that, then the scheme says you can't fill or do any further discharge without a permit, so that now we are at the juncture whereby you have gone past that regulatory scheme.

We are not at the permitting—the scheme and the statute. The bottom line is now that it is the jury, it is up to the jury to determine it, and whatever they determine, the Court will abide by, and if they determine that it is not wetlands, not waters of the United States, there is no permit required. If they determine that the EPA is right, they agree with the EPA, then you have got to get a permit, no further discharge without a permit. So it seems to me it is as simple as that at this point, and I think that's the scheme that is set up.

Now, I think you may have a different situation if the Hobbses had applied for a permit and the Corps had declined to take jurisdiction. I still don't think that would preclude the EPA from bringing that action. What it would do is be evidence for you to present of estoppel, that the United States is estopped from proceeding be-

cause the [1164] Army Corps of Engineers has said you don't need a permit.

But under that statutory scheme, on close examination, I'm of the opinion that the EPA and the Corps, either one of them, can go in in and make the determination, and either one of them can enforce, and whether or not they agree, that's something that you present to the jury, and certainly you will be able to present to the jury all you want what Mr. McGlaun did and what the Corps has and Julie Steele's testimony.

But at this point in time a jury is going to determine whether or not it is wetlands or waters of the United States, whether they agree with the EPA. And even if in the meantime the Hobbses had applied for a permit and the Corps said, we decline to exercise jurisdiction because we don't believe they are wetlands, what you would have at that point is a conflict as between agencies and case law. A lot of case law says when you get that kind of conflict, the EPA's determination controls, that they are the superior organization in determining whether there is jurisdictional wetlands.

MR. NAGEOTTE: If I may say just one more thing, Your Honor.

THE COURT: All right.

MR. NAGEOTTE: And I'll sit down.

The only other point I wanted to make, Your Honor [1165] may have a point in the situation where the Corps doesn't know about the situation. But that is not this case. This is a case where the Corps had actual—not even constructive notice, I mean actual knowledge, and went for a period of—a number of months not taking action.

THE COURT: Then I think that is favorable evidence you can present to the jury, and I haven't precluded you from it. And I'm going to let you present that to the jury, and I think that's the appropriate way that evidence is considered.

I think it is another factor for them to determine whether or not there are jurisdictional wetlands out there.

MR. NAGEOTTE: Thank you, Your Honor.

THE COURT: All right, Mr. Shaffer, anything you want to say in addition to what you have included in the trial memorandum, or Mr. Carson?

MR. SHAFFER: No, Your Honor. Unless the Court has some questions for me in terms of the defense motion, I have nothing to say.

THE COURT: No.

MR. SHAFFER: Clearly we feel like we have proven more than enough to get to a jury, and we feel the motion under Rule 50 should be denied.

THE COURT: This is a motion for directed verdict, and all the evidence and inferences have to be drawn in [1166] favor of the nonmoving party.

In any event, I'll briefly review my reasons for denying the motion. Some of them are the same as I have just expressed to Mr. Nageotte, and for the reasons that I have expressed in conversation with him while he was arguing his motion, and in addition to for the reasons I state now, I deny the defendant's motion for a directed verdict.

At a threshold level, I think that Mr. Nageotte's argument assumes that there is only one agency with jurisdiction and authority in this matter to enforce, and I think that that is incorrect as a matter of law. I think that there are two equal enforcement agencies contemplated under the statute and the regulations, and that EPA and the Corps have equal enforcement powers under the Clean Water Act.

He said that the key question here was whether the Corps asserted Clean Water Act jurisdiction and required the Hobbses to have a permit.

My response to that question is that, first of all, there is no requirement that the Corps assert jurisdiction, because the EPA has already asserted it in this case, and under the scheme that is contemplated, EPA has equal enforcement powers under the Clean Water Act, and they

can make an independent determination of jurisdiction and, in fact, under the case law as cited in the trial [1167] memorandum of the United States, the EPA's jurisdictional determination, according to some courts, is superior and holds when there is a conflict as between the Army Corps of Engineers and the Environmental Protection Agency.

In addition, I would note that the Army Corps of Engineers does not have to require a permit. The Hobbses could have applied for a permit under the statutory scheme and the Clean Water Act, and they haven't applied for a permit. So no permit has been denied. That is as a factual matter. It is all—everybody agrees they haven't applied for a permit and had the Corps deny a permit.

Even if they had, it would be my opinion under the —and I want to reiterate they haven't, so it is really not an issue—but even if they had applied, for the sake of argument, for a permit and the Army Corps of Engineers had made a determination that a permit was not necessary because there weren't jurisdictional wetlands involved, I'm of the opinion that the EPA could still go forward with an enforcement action.

Now, that evidence would certainly come in and be for the jury or the Court, whoever was finding the facts, to consider, and it would certainly go to the legal issue of estoppel. If the Corps found a permit unnecessary, certainly the argument could then be made that the United States would be estopped from proceeding. And it may even [1168] be on the estoppel issue a matter of law a Court might conclude. But that is not an issue that I need reach, because it is not the situation here.

And I am just taking the points as I wrote them in my notes. There is a mention about Mr. McGlaun. Well, I would note that Mr. McGlaun has not testified, and as far as the Court is concerned, the only evidence before the Court at this time was from Mr. Frazer and Ms. Steele, and basically it was from Mr. Frazer, that it was

left up to him to do further work, that Mr. McGlaun did not make any determination, he only went out there once, he didn't make any determination, and that it was left up to Mr. Frazer to pursue further, and there has been no evidence as to what Mr. McGlaun may or may not have concluded as a result of Mr. Frazer's further inquiry.

In addition, the testimony from Ms. Steele was that at some point in time it was determined, because of manpower—for manpower reasons, that the EPA would go forward with the enforcement and not the Corps of Engineers, and that was the evidence in regard to why the letter to Colonel Thomas was unanswered.

There basically is no evidence before the Court at this point that the Secretary of the Army, through Colonel Thomas and the local Army Corps of Engineers, has refused a permit, number one, because nobody has applied; and, number [1169] two, because Ms. Steel has said at some point in time, we simply left it up to the EPA to enforce.

As a matter of general principle, again I reiterate that both EPA and the Corps have equal enforcement powers under the Clean Water Act. That the Corps has not gone through a permitting process in my opinion does not preclude the Environmental Protection Agency from utilizing its enforcement powers under the statute, and that they can make an independent determination of jurisdiction, and that even if the Corps—for some reason it could be argued that they haven't properly performed under the regulations—in other words, they didn't complete their investigation and determination—let's see, I think that what Mr. Nageotte was arguing was that under the regulations, their regulation, that they must investigate and determine whether a permit was required. That they failed to do something that they maybe were supposed to have done again in my opinon does not preclude EPA enforcement.

Again I would mention that in some ways the scheme that is set up anticipates that an individual will apply

for a permit. The Hobbses could have; they didn't. And ignorance of the law, that we are lay people or whatever, is never an excuse for not complying with the law.

In any event, there has been no determination by the Army Corps of Engineers as to whether they need a permit [1170] or not. The bottom line, as I said, is it is now up to the jury to determine. We are at a stage where the EPA has come in, they have said, we make a jurisdictional determination that there are wetlands and waters of the United States involved, and improper fill. We have enforcement powers under the act. We have an ability to make an independent jurisdictional determination. We think that there is discharge without a permit. We bring an enforcement action.

Now, whether or not the jury agrees with the EPA is what we are here for right now. Whether or not they agreee that there are wetlands involving waters of the United States—those are going to be matters of fact for the jury to determine. That's what this suit is all about, and as I have indicated, I'm going to allow the defendants to bring in all the evidence as to what the different agencies did or didn't do, what their procedures are, what all the experts utilized to determine whether they are jurisdictional wetlands and how you go about making both the delineation and the jurisdictional determination, and then it is going to be up to the jury to decide whether by a preponderance of the evidence the United States has proven its case, and for those reasons, I deny the motion for a directed verdict.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 89-327-N

S. PAUL HOBBS, *et al.*,
Plaintiffs and
Counterclaim Defendants,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants and
Counterclaimants.

JUDGMENT IN A CIVIL CASE

[Filed Aug. 24, 1990]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the following motions are denied:

1. Motion of Donna M. Hobbs and Dorothy V. Hobbs for a new trial;

2. Motions of S. Paul Hobbs and Donna M. Hobbs, and Phillip Ray Hobbs and Dorothy V. Hobbs for judgments notwithstanding the verdicts or, in the alternative, new trials;

3. Motions of S. Paul Hobbs and Donna M. Hobbs, and Phillip Ray Hobbs and Dorothy V. Hobbs to stay entry of final judgment;

4. Second motion of counterclaim defendants for judgment notwithstanding the verdict;

5. Motion of United States of America to sanction counsel pursuant to Federal Rules of Civil Procedure 11.

Date August 24, 1990

DORIS R. CASEY
Clerk

/s/ [Illegible]
(By Deputy Clerk

APPENDIX D

Filed December 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1861

S. PAUL HOBBS; DONNA M. HOBBS, his wife;
PHILLIPS RAY HOBBS;
DOROTHY V. HOBBS, his wife,
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA; WILLIAM REILLY, Administrator United States Environmental Protection Agency (A-100); STANLEY L. LASKOWSKI, Acting Administrator, United States Environmental Protection Agency, Region III; GREENE A. JONES, Director, Environmental Services Division, United States Environmental Protection Agency, Region III; JOHN O. MARSH, JR., and/or; RICHARD L. ARMITAGE, after confirmation, Secretary of the Army; LIEUTENANT GENERAL HENRY J. HATCH, Chief, Army Corps of Engineers; MAJOR GENERAL JAMES W. VAN LOBEN SELS, North Atlantic Division Engineer; JOSEPH H. THOMAS, Norfolk District Engineer,
Defendants-Appellees

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX E

[Filed Jan. 26, 1990]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 89-327-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

S. PAUL HOBBS, and DONNA M. HOBBS, his wife,
Defendants.

FORM OF VERDICT

1. Is the property of S. Paul Hobbs and Donna M. Hobbs, which is the subject of this lawsuit, a wetland?

Yes × No ——

If no, return to the courtroom.

If yes, proceed to questions 2 and 3.

2. If the property is a wetland, is it adjacent to the Ware River or a tributary of the Ware River?

Yes × No ——

3. Did S. Paul Hobbs and/or Donna M. Hobbs discharge a pollutant onto their wetland property in 1986?

Yes × No ——

If yes, answer question 4 and then proceed to question 5.

If no, proceed directly to question 5.

4. Was the 1986 discharge of a pollutant a discharge onto a wetland consisting of less than one acre?

Yes —— No ×

5. Did S. Paul Hobbs and/or Donna M. Hobbs discharge a pollutant onto their wetland property in 1987?

Yes × No ——

If yes, answer question 6 and then proceed to question 7.

If no, proceed directly to question 7.

6. Was the 1987 discharge of a pollutant a discharge onto a wetland consisting of less than one acre?

Yes —— No ×

7. Did S. Paul Hobbs and/or Donna M. Hobbs discharge a pollutant onto their wetland property in 1988?

Yes × No ——

If yes, answer question 8 and then proceed to question 9.

If no, proceed directly to question 9.

8. Was the 1988 discharge of a pollutant a discharge onto a wetland consisting of less than one acre?

Yes —— No ×

9. Did S. Paul Hobbs and/or Donna M. Hobbs discharge a pollutant onto their wetland property in 1989?

Yes —— No ×

If yes, answer question 10 and then proceed to question 11.

If no, proceed directly to question 11.

10. Was the 1989 discharge of a pollutant a discharge onto a wetland consisting of less than one acre?

Yes —— No ——

11. Did S. Paul Hobbs and Donna M. Hobbs comply with the Administrative Order of the United States Environmental Protection Agency dated March 23, 1989, and amended April 25, 1989?

Yes —— No ×

/s/ [Illegible]
Foreperson

Date Jan. 26, 1990

[Filed Jan. 26, 1990]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 89-327-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

PHILLIP RAY HOBBS, and
DOROTHY V. HOBBS, his wife,
Defendants.

FORM OF VERDICT

1. Is the property of Phillip Ray Hobbs and Dorothy V. Hobbs, which is the subject of this lawsuit, a wetland?

Yes × No ——

If no, return to the courtroom.

If yes, proceed to questions 2 and 3.

2. If the property is a wetland, is it adjacent to the Ware River or a tributary of the Ware River?

Yes × No ——

3. Did Phillip Ray Hobbs and/or Dorothy V. Hobbs discharge a pollutant onto their wetland property in 1980?

Yes × No ——

If yes, answer question 4 and then proceed to question 5.

If no, proceed directly to question 5.

4. Was the 1980 discharge of a pollutant a discharge onto a wetland consisting of less than one acre?

Yes —— No ×

5. Did Phillip Ray Hobbs and/or Dorothy V. Hobbs discharge a pollutant onto their wetland property in 1984?

Yes × No ——

If yes, answer question 6 and then proceed to question 7.

If no, proceed directly to question 7.

6. Was the 1984 discharge of a pollutant a discharge onto a wetland consisting of less than one acre?

Yes —— No ×

7. Did Phillip Ray Hobbs and/or Dorothy V. Hobbs discharge a pollutant onto their wetland property in 1985?

Yes × No ——

If yes, answer question 8 and then proceed to question 9.

If no, proceed directly to question 9.

8. Was the 1985 discharge of a pollutant a discharge onto a wetland consisting of less than one acre?

Yes —— No ×

9. Did Phillip Ray Hobbs and Dorothy V. Hobbs comply with the Administrative Order of the United States Environmental Protection Agency dated March 23, 1989, and amended April 25, 1989?

Yes —— No ×

/s/ [Illegible]
Foreperson

Date Jan. 26, 1990

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 89-327-N

S. PAUL HOBBS, and DONNA M. HOBBS, his wife,

and

PHILLIP RAY HOBBS, and DOROTHY V. HOBBS, his wife,
Plaintiffs,

v.

UNITED STATES OF AMERICA
by service of process upon:

RICHARD THORNBURGH
ATTORNEY GENERAL OF THE UNITED STATES,

and

HENRY HUDSON, UNITED STATES ATTORNEY

and

WILLIAM REILLY, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

and

STANLEY L. LASKOWSKI, ACTING ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
REGION III,

and

GREEN A. JONES, DIRECTOR
ENVIRONMENTAL SERVICES DIVISION,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
REGION III,

and

HONORABLE JOHN O. MARSH, JR. and/or
RICHARD L. ARMITAGE, SECRETARY OF THE ARMY,

and

LT. GENERAL HENRY J. HATCH,
CHIEF, ARMY CORPS OF ENGINEERS,

and

MAJOR GENERAL JAMES V. VAN LBOEN SELS,
NORTH ATLANTIC DIVISION ENGINEER,

and

COL. J. J. THOMAS, NORFOLK DISTRICT ENGINEER,
U.S. ARMY CORPS OF ENGINEERS,
Defendants.

UNITED STATES OF AMERICA,
Counterclaim-Plaintiff,

v.

S. PAUL HOBBS, and DONNA M. HOBBS, his wife,

and

PHILLIP RAY HOBBS, and DOROTHY V. HOBBS, his wife,
Counterclaim-Defendants.

ANSWER AND COUNTERCLAIM

The Defendants hereby respond to the correspondingly numbered paragraphs of Plaintiffs' Complaint as follows:

Jurisdiction

1. The averments of Paragraph 1 of the Complaint state only legal conclusions as to which no answer is required.

Venue

2. The averments of Paragraph 2 of the Complaint state only legal conclusions as to which no answer is required.

Summary of Complaint

3. The averments of Paragraph 3 of the Complaint contain Plaintiffs' characterization of their action and to the extent a response is required, they are denied.

Attorneys Fees and Costs

4. The averments of Paragraph 4 of the Complaint state only legal conclusions as to which no answer is required.

Parties

5. The Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in the first sentence of Paragraph 5 and therefore deny same. The Defendants admit that the United States Environmental Protection Agency ("EPA") has asserted jurisdiction over Plaintiffs' property located in Ware Neck, Gloucester County, Virginia, pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344. The Defendants further admit that EPA issued a Findings of Violation and Order for Compliance regarding that same property. The Defendants deny the remaining allegations in Paragraph 5.

6. The Defendants admit that the individuals named in Paragraph 6 are officers and employees of the United States of America, and, acting in their official capacities, are charged with responsibilities under section 404 of the Clean Water Act. The remainder of the allegations in Paragraph 6 state only legal conclusions as to which no answer is required.

Factual Background

7. The Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in Paragraph 7 and therefore deny same. To the extent that Paragraph 7 merely characterizes or summarizes the tax map attached as Exhibit "C" to Plaintiffs' Complaint, no answer is required since that document represents the best evidence of its contents.

8. The Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in Paragraph 8 and therefore deny same.

9. The Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in Paragraph 9 and therefore deny same.

10. As that portion of Paragraph 10 which avers that "all of the property is zoned agricultural by the Gloucester County Zoning Ordinance," the Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of that allegation and therefore deny same. The remaining averments in Paragraph 10 state only legal conclusions as to which no answer is required.

11. As to the averments in Paragraph 11, the Defendants admit that the Plaintiffs installed drainage ditches and cleared portions of the property in question. The remaining averments in Paragraph 11 of the Complaint either state legal conclusions as to which no answer is required or allegations which are denied since the Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those averments.

12. As to the averments in Paragraph 12, the Defendants admit that prior to March 23, 1989, EPA or the

Corps had not asserted Clean Water Act jurisdiction over Plaintiffs' property located in Ware Neck, Gloucester County, Virginia. The Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining averments in Paragraph 12 and therefore deny same.

13. The Defendants admit the allegations contained in the first sentence of Paragraph 13 of the Complaint, however deny the remaining allegations in Paragraph 13.

14. The averments of Paragraph 14 of the Complaint are denied.

15. As to the averments in Paragraph 15 of the Complaint, the Defendants deny that the Corps or any of its representatives ever made a jurisdictional finding or determination with respect to Plaintiffs' property located in Ware Neck, Gloucester County, Virginia. The remaining averments in Paragraph 15 are admitted.

16. As to the averments in Paragraph 16 of the Complaint, the Defendants admit the factual allegations contained therein. However the Defendants deny a prior notice and hearing are required under the Clean Water Act or applicable EPA regulations.

17. To the extent that Paragraph 17 of the Complaint merely characterizes or summarizes the map attached as Exhibit "C" to Plaintiffs' Complaint and also attached to EPA's Findings of Violation and Order for Compliance, no answer is required since that document represents the best evidence of its contents. The Defendants admit that portions of the Plaintiffs' property on Ware Neck, Gloucester County, Virginia remain in a forested condition and have not been cultivated. As to the remaining averments in Paragraph 17, the Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations and therefore deny same.

18. To the extent that Paragraph 18 of the Complaint merely characterizes or summarizes EPA's Findings of Violation and Order for Compliance, no answer is required since that document represents the best evidence of its contents. The remaining averments in Paragraph 18 either state legal conclusions as to which no answer is required or are denied.

19. The averments of Paragraph 19 of the Complaint state only legal conclusions as to which no answer is required.

20. The averments of Paragraph 20 of the Complaint state only legal conclusion as to which no answer is required.

21. To the extent that Paragraph 21 of the Complaint merely characterizes or summarizes EPA's Findings of Violation and Order for Compliance, no answer is required since that document represents the best evidence of its contents. The Defendants note, however, that on April 25, 1989, an Amended Findings of Violation and Order for Compliance was issued by EPA stating that Plaintiffs' property "contains wetlands which are adjacent to streams which drain into the Ware River." A true and correct copy of that Amended Findings of Violation and Order for Compliance is attached hereto as Exhibit "1" and incorporated by reference.

22. As to the averments in Paragraph 22, the Defendants admit that Plaintiffs' property is separated from the Ware River by various properties and Virginia State Roads. The Defendants note, however, that Plaintiffs' property on Ware Neck is adjacent to streams which drain into the Ware River.

23. As to the averments in the first two sentences of Paragraph 23 of the Complaint, the Defendants are without knowledge or information sufficient to form a belief as to their truth or falsity and therefore deny same. To the extent that the remaining averments in Paragraph 23

state only legal conclusions or merely characterize or summarize Exhibit "A" attached to Plaintiffs' Complaint, no answer is required since that Exhibit represents the best evidence of its contents.

24. To the extent that Paragraph 24 of the Complaint merely characterizes or summarizes Exhibits "D" and "E" attached to Plaintiffs' Complaint, no answer is required since those documents represent the best evidence of their contents.

25. The Defendants deny the averments contained in the first sentence of Paragraph 25 of the Complaint. The Defendants admit that Plaintiffs' property is characterized by hydric soils and that ponding occurs on the property during the wet season. The Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 25.

26. To the extent that Paragraph 26 states only legal conclusions or merely characterizes or summarizes the contents of Exhibits "A", "D", and "E" attached to Plaintiffs' Complaint, no answer is required since those Exhibits represent the best evidence of their contents.

Count I

27. The Defendants incorporate by reference their responses to the averments in Paragraphs 1 through 26 of the Complaint.

28. The averments of Paragraph 28 are denied.

Count II

29. The Defendants incorporate by reference their responses to the averments in Paragraph 1 through 28 of the Complaint.

30. The averments of Paragraph 30 are denied.

31. To the extent that Paragraph 31 merely characterizes or summarizes 33 C.F.R. § 328.3(a)(3), no answer

is required since that regulation represents the best evidence of its contents.

32. The averments of Paragraph 32 are denied.

33. The averments of Paragraph 33 are denied.

34. The averments of Paragraph 34 are denied.

Count III

35. The Defendants incorporate by reference their responses to the averments in Paragraphs 1 through 34 of the Complaint.

36. The averments of Paragraph 36 are denied.

37. The averments of Paragraph 37 are denied.

Count IV

38. The Defendants incorporate by reference their responses to the averments in Paragraph 1 through 37 of the Complaint.

39. As to the averments in Paragraph 39 of the Complaint, the Defendants admit that EPA issued its Findings of Violation and Order for Compliance without prior notice or a hearing. The remaining averments in Paragraph 39 are denied.

40. The averments of Paragraph 40 are denied.

41. The averments of Paragraph 41 are denied.

42. The averments of Paragraph 42 are denied.

43. The averments of Paragraph 43 are denied.

44. The averments of Paragraph 44 are denied.

Prayers for Relief

The Defendants deny that Plaintiffs are entitled to the relief requested in Counts I through IV of the Complaint and pray for their discharge from the Complaint together with all costs and all other appropriate or available relief.

General Denial

To the extent that any allegations in the Complaint are not specifically answered or addressed herein, such allegations shall be deemed specifically denied.

First Affirmative Defense

Plaintiffs' claims in Counts III and IV of the Complaint fail to state claims upon which relief can be granted.

Second Affirmative Defense

Plaintiffs' claims in Count III of the Complaint fail for lack of subject matter jurisdiction.

Third Affirmative Defense

Plaintiffs' claims in Count IV of the Complaint are barred by the doctrines of absolute or qualified immunity.

COUNTERCLAIM

The United States of America, by authority of the Attorney General and at the request of the Administrator of the United States Environmental Protection Agency, for its Counterclaim alleges as follows:

STATEMENT OF THE CASE

1. This is a counterclaim instituted under sections 309(b) and 309(d) of the Clean Water Act (hereinafter "CWA"), 33 U.S.C. §§ 1319(b) and 1319(d), to obtain injunctive relief and civil penalties for Plaintiffs'/Counterclaim Defendants' (hereinafter "Counterclaim Defendants") failure to comply with section 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. Authority to bring this suit is vested in the United States Department of Justice by 28 U.S.C. § 516 and § 519 and 33 U.S.C. 1366.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this Counterclaim pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331, 1345, and 1355. Notice of the commencement of this action has been given to the Commonwealth of Virginia pursuant to 33 U.S.C. § 1319(b).

4. Venue is properly in this court pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b).

5. Counterclaim Defendants S. Paul and Donna M. Hobbs, and Phillip Ray and Dorothy V. Hobbs, are and at all times pertinent to this counterclaim have been residents of the Commonwealth of Virginia, residing in Virginia Beach, Virginia.

GENERAL ALLEGATIONS

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, among other things, the discharge of pollutants into navigable waters except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

7. The term "pollutant" is defined under section 502(6) of the CWA, 33 U.S.C. § 1362(6), to include fill material and dredge material consisting of soil, rock, and sand.

8. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into navigable waters at specific disposal sites after notice and an opportunity for public comment.

9. The term "discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The term "waters of the United States" has

been further defined to include wetlands. 40 C.F.R. § 230.3(s). The term "point source" is defined to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

10. At various times since 1980, on dates known more particularly to the Counterclaim Defendants, one or more of the Counterclaim Defendants discharged or caused to be discharged fill material consisting of rock, sand, and soil into wetlands located within the quadrant of land formed by Virginia State Route 623 and Virginia Route 625, known locally as "Ware Neck" and located on the tax map marked as "Exhibit C" attached to Plaintiffs' Complaint, incorporated herein by reference.

11. The fill material was discharged into the wetlands by the use of trucks, bulldozers, and other construction equipment.

12. The wetlands referred to in paragraphs 10 and 11 above (the "subject wetlands") are adjacent to streams which are tributaries of and drain into the Ware River. The Ware River flows into the Chesapeake Bay, an interstate water. Both the Ware River and the Chesapeake Bay are waters subject to the ebb and flow of the tide.

13. At all times relevant to the Counterclaim, the subject wetlands were owned and controlled by one or more of the Counterclaim Defendants.

14. The subject wetlands are "waters of the United States" within the meaning of 40 C.F.R. §§ 230.3(s) and 232.2(q) and, hence, are "navigable waters" within the definition in section 502(7) of the CWA, 33 U.S.C. § 1362(7), which states that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."

15. Each of the Counterclaim Defendants is a "person" as that term is defined in section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16. The rock, sand, and soil fill materials discharged or caused to be discharged into the subject wetlands by the Counterclaim Defendants are "pollutants" as that term is defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The various pieces of construction equipment used by the Counterclaim Defendants to discharge fill material into the subject wetlands are "point sources" as that term is defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. The discharges of fill material into waters of the United States by the Counterclaim Defendants are "discharges of pollutants" as that term is defined in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. The Counterclaim Defendants have never applied for or obtained a permit from the Secretary of the United States Army, acting personally or through the Army Corps of Engineers (the "Corps"), prior to discharging fill material into the subject wetlands.

20. At no time has the Secretary of the Army, acting for himself or through the Corps, issued any of the Counterclaim Defendants a permit pursuant to section 404 of the CWA, 33 U.S.C. § 1344, authorizing the discharge of fill material into the subject wetlands.

FIRST CLAIM FOR RELIEF

21. The United States repeats and realleges the allegations set forth in paragraphs 1 through 20.

22. At various times since 1980, on dates known more particularly to Counterclaim Defendants, one or more of the Counterclaim Defendants discharged fill materials or caused fill materials to be discharged into the subject wetlands.

23. The Counterclaim Defendants have violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by their un-

permitted discharges of fill materials into the subject wetlands.

24. Each day that such fill remains in the subject wetlands constitutes a separate violation of section 301 (a) of the CWA, 33 U.S.C. § 1311(a).

25. Section 309(b) of the CWA, 33 U.S.C. § 1319(b) authorizes the Environmental Protection Agency to commence a civil action for appropriate relief, including a permanent or temporary injunction, for violations of section 301(a) of the CWA 33 U.S.C. § 1311(a). Pursuant to section 309(d) of the CWA, 33 U.S.C. § 1319(d), any person who violates section 301(a) shall be subject to a civil penalty not to exceed $25,000 per day of violation occurring on or after February 4, 1987, and not to exceed $10,000 per day of violation occurring before February 4, 1987.

SECOND CLAIM FOR RELIEF

26. The United States repeats and realleges the allegations set forth in Paragraphs 1 through 25.

27. By Administrative Order dated March 23, 1989, and amended April 25, 1989, copies of which are marked Exhibits "2" and "3" attached hereto and incorporated herein, issued pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), the Environmental Protection Agency ordered Counterclaim Defendants to cease and desist all discharge activities into the subject wetlands and to submit a narrative description and restoration plan for initial corrective measures of the wetland area and for mitigation of the environmental harm caused to the wetlands. The Administrative Order set forth corrective measures which should be incorporated into the restoration plan. The Administrative Order also required completion of all elements of the restoration plan within 60 days of the date of EPA's approval of the restoration plan.

28. The narrative description and restoration plan required by the Administrative Order were to be submitted within 30 days of the date of the Order. Said plan has not been received by EPA.

29. On May 4, 1989, a hearing was held in the Eastern District of Virginia, Norfolk Division, on Plaintiffs'/Counterclaim Defendants' Motion for a Temporary Restraining Order in this action. As a result of that hearing, the Court issued a preliminary injunction permitting Plaintiffs/Counterclaim Defendants to continue farming activities on that portion of their property on Ware Neck which was already under cultivation. The Court further enjoined Plaintiffs/Counterclaim Defendants from draining, filling, or cultivating the remaining portions of their property on Ware Neck.

30. Prior to May 4, 1989, EPA had not received a narrative description and restoration plan from Plaintiffs/Counterclaim Defendants, as required by the Administrative Order.

31. Section 301(a) of the CWA, 33 U.S.C. 1311(a), prohibits the unpermitted discharge of dredged or fill material into navigable waters. Pursuant to section 309 (d) of the CWA, 33 U.S.C. § 1319(d), any person who violates section 301 or any order issued by the Administrator under subsection (a) of that section shall be subject to a civil penalty not to exceed $25,000 per day of each violation.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully prays that:

1. The Counterclaim Defendants be permanently enjoined from discharging additional fill materials into the subject wetlands except in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

2. (a) The Counterclaim Defendants be enjoined to restore at their own expense and pursuant to plans approved by the Environmental Protection Agency, all of the subject wetlands to which they, or any one of them, discharged fill material without authorization from a Corps permit, to their natural condition prior to the discharges; such restoration shall include, without limitation, wetlands revegetation and the removal of all unlawfully discharged fill material.

(b) Alternatively, if the Environmental Protection Agency determines that restoration of any portions of the subject wetlands cannot be accomplished successfully, that the Counterclaim Defendants be enjoined, at their own expense and pursuant to plans approved by the Environmental Protection Agency, to undertake measures to create new wetlands to fully replace the functional value of the unlawfully filled subject wetlands that cannot be restored.

3. The Counterclaim Defendants be assessed, jointly and severally, pursuant to section 309(d) of the CWA, 33 U.S.C. § 1319(d), a civil penalty not to exceed ten thousand dollars ($10,000) for each day of each violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), prior to February 4, 1987, and not to exceed twenty-five thousand dollars ($25,000) for each day of each violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), since and including February 4, 1987.

4. The Counterclaim Defendants be assessed, jointly and severally, pursuant to section 309(d) of the CWA, 33 U.S.C. § 1319(d), a civil penalty not to exceed twenty-five thousand dollars ($25,000) for each day of failure to comply with the Administrative Order prior to May 4, 1989.

5. The United States be awarded costs and disbursements in this section, and granted such further relief as the court determines appropriate.

Respectfully submitted,

DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division

CRAIG B. SHAFFER
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Environmental Defense Section
Land and Natural Resources Division
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HENRY HUDSON
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Philadelphia, PA 19107

FRANCES HIGGINS
Office of Counsel
Norfolk District Engineer
U.S. Army Corps of Engineers
803 Front Street
Norfolk, Virginia 23510-1096

[EPA Logo]

UNITED STATES ENVIRONMENTAL AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Mar. 23, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Philip R. and Dorothy V. Hobbs
1016 Hobbs Road
Virginia Beach, Virginia 23464

Re: EPA Docket No. III-89-028-DW
FINDINGS OF VIOLATION and
ORDER FOR COMPLIANCE

Dear Mr. & Mrs. Hobbs:

Region III of the Environmental Protection Agency (hereinafter "EPA") has learned that fill material has been discharged into wetlands adjacent to Ware River in Ware Neck, Gloucester County, Virginia. A January 23, 1989 site inspection by EPA and the U.S. Fish and Wildlife Service has verified that Ware River and the adjacent wetland area in question constitutes "waters of the United States" and are therefore subject to regulation under provisions of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

As you may be aware, EPA is responsible for the administration of certain provisions of the Clean Water Act. Pursuant to Section 301(a) of the Act, 33 U.S.C. § 1311 (a), the discharge of any dredged or fill material into waters of the United States by any person is unlawful, except as in compliance with a lawfully issued Clean Water Act permit. Information available to EPA indicates that you are responsible for the unauthorized discharge of fill material into Ware Creek and the adjacent

wetlands. This filling constitutes a discharge of pollutants to the Nation's waters in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). As a violator of Section 301(a) of the Act, you are subject to enforcement action under Section 309 of the Act, 33 U.S.C. § 1319, and the enclosed FINDINGS OF VIOLATION and ORDER FOR COMPLIANCE require you to cease and desist your unauthorized activities immediately.

EPA prefers to see the violations resolved administratively, and urges your cooperation. You are hereby advised that EPA seeks mitigation of the environmental harm caused by your unauthorized filling activities by removal of the fill material and restoration of the filled wetlands. At this time, EPA solicits your voluntary compliance with the enclosed ORDER.

EPA is prepared to discuss the matter with you and to help formulate and/or review any plan or schedule for mitigation of the environmental harm and for restoration of the affected area. Mr. James R. Butch is assigned to this matter and may be reached at (215) 597-7816.

Please note that the ORDER requires a written response within five working days of your receipt of this letter.

Sincerely,

/s/ Greene A. Jones
GREENE A. JONES
Director
Environmental Services Division

Enclosure

cc: Regional Hearing Clerk (3RC30)
U.S. Army Corps of Engineers, Norfolk, VA
U.S. Fish and Wildlife Service, White Marsh, VA
EPA, James R. Butch (3ES42)
EPA, Ellen Teplitzky (3RC30)
EPA, Hazel Groman (A-104 F)
National Marine Fisheries Service, Oxford, MD.

[EPA LOGO]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mar. 23, 1989

S. Paul and Donna M. Hobbs
1016 Hobbs Road
Virginia Beach, Virginia 23464

Re: EPA Docket No. III-89-028-DW
FINDINGS OF VIOLATION and ORDER FOR COMPLIANCE

Dear Mr. & Mrs. Hobbs:

Region III of the Environmental Protection Agency (hereinafter "EPA") has learned that fill material has been discharged into wetlands adjacent to Ware River in Ware Neck, Gloucester County, Virginia. A January 23, 1989 site inspection by EPA and the U.S. Fish and Wildlife Service has verified that Ware River and the adjacent wetland area in question constitute "waters of the United States" and are therefore subject to regulation under provisions of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

As you may be aware, EPA is responsible for the administration of certain provisions of the Clean Water Act. Pursuant to Section 301(a) of the Act, 33 U.S.C. § 1311(a), the discharge of any dredged or fill material into waters of the United States by any person is unlawful, except as in compliance with a lawfully issued Clean Water Act permit. Information available to EPA indi-

cates that you are responsible for the unauthorized discharge of fill material into Ware Creek and the adjacent wetlands. This filling constitutes a discharge of pollutants to the Nation's waters in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). As a violator of Section 301(a) of the Act, you are subject to enforcement action under Section 309 of the Act, 33 U.S.C. § 1319, and the enclosed FINDINGS OF VIOLATION and ORDER FOR COMPLIANCE require you to cease and desist your unauthorized activities immediately.

EPA prefers to see the violations resolved administratively, and urges your cooperation. You are hereby advised that EPA seeks mitigation of the environmental harm caused by your unauthorized filling activities by removal of the fill material and restoration of the filled wetlands. As this time, EPA solicits your voluntary compliance with the enclosed ORDER.

EPA is prepared to discuss the matter with you and to help formulate and/or review any plan or schedule for mitigation of the environmental harm and for restoration of the affected area. Mr. James R. Butch is assigned to this matter and may be reached at (215) 597-7816.

Please note that the ORDER requires a written response within five working days of your receipt of this letter.

Sincerely,

/s/ Greene A. Jones
GREENE A. JONES
Director
Environmental Services Division

Enclosure

cc: Regional Hearing Clerk (3RC30)
U.S. Army Corps of Engineers, Norfolk, VA
U.S. Fish and Wildlife Service, White Marsh, VA
EPA, James R. Butch (3ES42)
EPA, Ellen Teplitzky (3RC30)
EPA, Hazel Groman (A-104 F)
National Marine Fisheries Service, Oxford, MD.

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Docket No. III-89-028-DW

IN THE MATTER OF PHILIP R. and DOROTHY V. HOBBS and S. PAUL and DONNA M. HOBBS, WARE NECK, GLOUCESTER COUNTY, VA.

Respondents.

PROCEEDINGS UNDER SECTION 309(a) OF THE CLEAN WATER ACT, 33 U.S.C. § 1319(a)

FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE

The following FINDINGS OF VIOLATION are made and ORDER FOR COMPLIANCE is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (hereinafter "EPA") under Section 309 of the Clean Water Act, 33 U.S.C. § 1319, which authority has been delegated by the Administrator to the Regional Administrator, EPA Region III, and by the Regional Administrator further delegated to the Director of the Environmental Services Division, who issues this ORDER.

I. *FINDINGS OF VIOLATION*

1. Philip R. and Dorthy V. Hobbs, (Husband & Wife) and S. Paul and Donna M. Hobbs, (Husband & Wife) own or control real property located in Ware Neck,

Gloucester County Virginia shown on the maps attached here as Exhibits 1 through 4. This land is adjacent to the Ware River.

2. Philip R. Hobbs, Dorothy V. Hobbs, S. Paul Hobbs and Donna M. Hobbs are hereinafter collectively referred to as Respondents. Respondents are persons as defined in subsection 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

3. The Ware River and its adjacent wetlands are waters of the United States as defined by Federal regulation, 33 C.F.R. § 323.2(a), and navigable waters as defined by Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

4. At specific times best known to Respondents, fill material consisting primarily of sand, rock and soil, was discharged into wetlands adjacent to Ware River from backhoes, bulldozers, and/or other heavy equipment operated by Respondents or persons acting under their direction for the purpose of converting wetlands to agriculture use.

5. The activities described in Paragraph 4 above were discharges of fill material, a pollutant, from point sources as defined by subsection 502(6), (12) and (14) of the Clean Water Act, 33 U.S.C. § 1362(6), (12) and (14), and Federal regulation, 33 C.F.R. § 323.2 (1986).

6. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army to issue permits for the discharge of fill material into the navigable waters.

7. The discharge of fill material into the navigable waters without authorization from the Secretary of the Army as provided by Section 404 of the Clean Water Act, 33 U.S.C. § 1344, in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), subjects the

discharger to the federal enforcement provisions of the Act set forth in Section 309 of the Act, 33 U.S.C. § 1319.

8. The Secretary of the Army has not issued a permit pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the filling activities described in Paragraph 4 above.

9. Respondents have violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), as specified in Paragraphs 1 through 8 above, by discharging fill material without authorization.

II. *ORDER FOR COMPLIANCE*

And now, this 23rd day of March, 1989, Respondents are hereby ordered, pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a) to:

1. Refrain from all further unauthorized discharges of dredged or fill material into any wetlands or waters at the Respondents' properties except in compliance with this ORDER.

2. Submit within 30 days of this ORDER, a narrative description and restoration plan for initial corrective measures of the wetland area and for mitigation of the environmental harm caused to the wetland, that incorporates the following:

   a) Installation of earthen drainage ditch plugs at the outlet of each drainage ditch. The ditch plugs shall extend for a minimum distance of 50 feet along each ditch.

   b) Provision of a 75 foot wide buffer strip along both sides of all drainage ditches except for those sides of the ditches that are bordered by a roadway. This shall be accomplished by refraining from any further disturbances, including but not limited to plowing, or cutting vegetation, applying agricultural chemicals, or grazing of livestock in

the buffer strip areas. (The purpose of establishing the buffer areas is to naturally revegetate the wetlands with indigenous wetland species and ensure mitigation of the adverse effects of clearing and drainage on water quality).

3. Upon EPA approval of the restoration plan described in paragraph II.2 hereof, complete all elements of said plan within 60 days of the date of EPA's approval.

4. Notify EPA when restoration work is started and when it is completed.

5. Allow representatives of EPA, and the U.S. Fish and Wildlife Service access to the site to inspect the restoration work in order to assure the effectiveness of the plan over a continued period of time.

6. Upon completion of work, a biologist, professional engineer or similar professional shall certify to EPA that the restoration measures set forth in this ORDER have been fully and satisfactorily completed.

7. Submit, within five working days from receipt of this ORDER, written notice of intent to comply with the requirements of this ORDER. The notice should be sent to:

James R. Butch, Enforcement Coordinator
Wetlands and Marine Policy Section (3ES42)
United States Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Dated: Mar. 20, 1989

s/ Greene A. Jones
GREENE A. JONES
Director
Environmental Services Division
United States Environmental
Protection Agency—Region III

[EPA LOGO]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Apr. 25, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Philip R. and Dorothy V. Hobbs
1016 Hobbs Road
Virginia Beach, Virginia 23464

Re: EPA Docket No. III-89-028-DW
Amended Findings of Violation and Order for Compliance

Dear Mr. & Mrs. Hobbs:

Enclosed is an Amended Findings of Violation and Order for Compliance ("Order") which pertains to work performed by you in wetlands in Ware Neck, Gloucester County Virginia. The Order was amended to include language which was inadvertently omitted from the first Order. The new language is contained in Section I.1 and is underlined for ease of reference.

If you have any questions about this amendment, please contact Ellen C. Teplitzky, Assistant Regional Counsel, at 215-597-9405.

Sincerely,

/s/ Greene A. Jones
Director
Environmental Services Division

Enclosure

cc: J. Butch (3ES41)
E. Teplitzky (3RC30)
Regional Hearing Clerk (3RC00)
U.S. Army Corps of Engineers, Norfolk, Va.
U.S. Fish & Wildlife Service, White Marsh, Va.
National Marine Fisheries Service, Oxford, Md.
Robert G. Byrum, Esq.

"EXHIBIT 3"

[EPA LOGO]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Apr. 25, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

S. Paul and Donna H. Hobbs
1016 Hobbs Road
Virginia Beach, Virginia 23464

Re: EPA Docket No. III-89-028-DW
Amended Findings of Violation and Order for Compliance

Dear Mr. & Mrs. Hobbs:

Enclosed is an Amended Findings of Violation and Order for Compliance ("Order") which pertains to work performed by you in wetlands in Ware Neck, Gloucester County, Virginia. The Order was amended to include language which was inadvertently omitted from the first Order. The new language is contained in Section I.1 and is underlined for ease of reference.

If you have any questions about this amendment, please contact Ellen C. Teplitzky, Assistant Regional Counsel, at 215-597-9405.

Sincerely,

/s/ Greene A. Jones
Director
Environmental Services Division

Enclosure

cc: J. Butch (3ES41)
E. Teplitzky (3RC30)
Regional Hearing Clerk (3RC00)
U.S. Army Corps of Engineers, Norfolk, Va.
U.S. Fish & Wildlife Service, White Marsh, Va.
National Marine Fisheries Service, Oxford, Md.
Richard R. Nageotte, Esq.

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Docket No. III-89-028-DW

IN THE MATTER OF
PHILIP R. and DOROTHY V. HOBBS, and
S. PAUL and DONNA M. HOBBS,
WARE NECK, Gloucester County, VA
Respondents.

PROCEEDINGS UNDER SECTION 309(a)
OF THE CLEAN WATER ACT,
33 U.S.C. § 1319(a)

AMENDED FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE

The following AMENDED FINDINGS OF VIOLATION are made and ORDER FOR COMPLIANCE is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (hereinafter "EPA") under Section 309 of the Clean Water Act, 33 U.S.C. § 1319, which authority has been delegated by the Administrator to the Regional Administrator, EPA Region III, and by the Regional Administrator further delegated to the Director of the Environmental Services Division, who issues this ORDER. The amendments to the original Findings of Violation are underlined below.

I. *FINDINGS OF VIOLATION*

1. Philip R. and Dorothy V. Hobbs, (Husband & Wife) and S. Paul and Donna M. Hobbs, (Husband & Wife) own

or control real property located in Ware Neck, Gloucester County Virginia shown on the maps attached hereto as Exhibits 1 through 4. This land *contains wetlands which are* adjacent to *streams which drain into* the Ware River.

2. Philip R. Hobbs, Dorothy V. Hobbs, S. Paul Hobbs and Donna M. Hobbs are hereinafter collectively referred to as Respondents. Respondents are persons as defined in subsection 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

3. The Ware River and its adjacent wetlands are waters of the United States as defined by Federal regulation, 33 C.F.R. § 323.2(a), and navigable waters as defined by Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

4. At specific times best known to Respondents, fill material consisting primarily of sand, rock and soil, was discharged into wetlands adjacent to Ware River from backhoes, bulldozers, and/or other heavy equipment operated by Respondents or persons acting under their direction for the purpose of converting wetlands to agriculture use.

5. The activities described in Paragraph 4 above were discharges of fill material, a pollutant, from point sources as defined by subsection 502(6), (12) and (14) of the Clean Water Act, 33 U.S.C. § 1362(6), (12) and (14), and Federal regulation, 33 C.F.R. § 323.2 (1986).

6. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army to issue permits for the discharge of fill material into the navigable waters.

7. The discharge of fill material into the navigable waters without authorization from the Secretary of the Army as provided by Section 404 of the Clean Water Act, 33 U.S.C. § 1344, in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a),

subjects the discharger to the federal enforcement provisions of the Act set forth in Section 309 of the Act, 33 U.S.C. § 1319.

8. The Secretary of the Army has not issued a permit pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the filling activities described in Paragraph 4 above.

9. Respondents have violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), as specified in Paragraphs 1 through 8 above, by discharging fill material without authorization.

II. *ORDER FOR COMPLIANCE*

And now, this 25th day of April, 1989, Respondents are hereby ordered, pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a) to:

1. Refrain from all further unauthorized discharges of dredged or fill material into any wetlands or waters at the Respondents' properties except in compliance with this ORDER.

2. Submit within 30 days of the date of this ORDER, a narrative description and restoration plan for initial corrective measures of the wetland area and for mitigation of the environmental harm caused to the wetland, that incorporates the following:

   a) Installation of earthen drainage ditch plugs at the outlet of each drainage ditch. The ditch plugs shall extend from a minimum distance of 50 feet along each ditch.

   b) Provision of a 75 foot wide buffer strip along both sides of all drainage ditches except for those sides of the ditches that are bordered by a roadway. This shall be accomplished by refraining from any further disturbances, including but not limited to plowing, or cutting vegetation, applying agricultural chemicals, or grazing of livestock in the buf-

fer strip areas. (The purpose of establishing the buffer areas is to naturally revegetate the wetlands with indigenous wetland species and ensure mitigation of the adverse effects of clearing and drainage on water quality).

3. Upon EPA approval of the restoration plan described in paragraph II.2 hereof, complete all elements of said plan within 60 days of the date of EPA's approval.

4. Notify EPA when restoration work is started and when it is completed.

5. Allow representatives of EPA, and the U.S. Fish and Wildlife Service access to the site to inspect the restoration work in order to assure the effectiveness of the plan over a continued period of time.

6. Upon completion of work, a biologist, professional engineer or similar professional shall certify to EPA that the restoration measures set forth in this ORDER have been fully and satisfactorily completed.

7. Submit, within five working days from receipt of this ORDER, written notice of intent to comply with the requirements of this ORDER. The notice should be sent to:

James R. Butch, Enforcement Coordinator
Wetlands and Marine Policy Section (3ES42)
United States Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Dated: Apr. 25, 1989

/s/ Greene A. Jones,
GREENE A. JONES,
Director
Environmental Services Division
United States Environmental
Protection Agency—Region III

APPENDIX G

AMENDMENT V.
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII.
CONSTITUTION OF THE UNITED STATES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The Clean Water Act, 33 U.S.C. §§ 1251 et seq., provides in relevant part:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USC §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

. . .

§ 1319. Enforcement

(a) State enforcement; compliance orders. (1) Whenever, on the basis of any information available to him, the Administrator finds that any person

is in violation of any condition or limitation which implements section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USC § 1311, 1312, 1316, 1317, 1318, 1328 or 1345] in a permit issued by a State under an approved permit program under section 402 or 404 of this Act [33 USCS § 1342 or 1344], he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USC § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USC § 1342] by him or by a State or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) a copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act [33 USC § 1318] shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in complaince with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act [33 USC § 1342] was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 301(b)(1)(A) [33 USC § 1311(b)(1)(A)] to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 301(b)(1)(A) or (C) of this Act [33 USC § 1311(b)(1)(A), (C)], (B) that such person cannot meet the requirements for a time extension under section 301(i)(2) of this Act [33 USC § 1311(i)(2)], and (C) that the most expeditious and appropriate means of compliance with this Act by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this Act at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

. . .

(d) Civil penalties. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USC § 1311, 1312, 1316, 1317, 1318, 1328 or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USC § 1342] by the Administrator, or by a State, or in a permit issued under section 404 of this Act [33 USC § 1344] by a State[,], or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)], and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

. . .

[Prior to February 4, 1987, 33 U.S.C. § 1319(d) provided:

> (d) Civil penalties. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USC § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USC § 1342] by the Administrator, or by a State, or in a permit issued under section 404 of this Act [33 USC § 1344] by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.]

. . .

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites. Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c) [33 USC § 1342(c)], and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site,

through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites. The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined. The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

. . .

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act:

. . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of

> this Act [33 USC § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.
>
> . . .
>
> (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
>
> . . .

The U.S. Army Corps of Engineers' Final Regulations, effective July 19, 1977, provided in relevant part:

> We have adopted the suggestion of many commenters that we incorporate into our definition (and not in the Preamble as we did in 1975) the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered "waters of the United States" under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Sections 208 and 402.

42 Fed. Reg., No. 138, 37127 (1977) (Preamble to Regulations codified at 33 C.F.R. Parts 320-330 (1977))

33 C.F.R. § 323.2 (1977):

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means:

(1) The territorial seas with respect to the discharge of fill material. (The transportation of dredged material by vessel for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 USC 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.);

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the

high tide line and the landward limit of jurisdiction in all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

. . .

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

The U.S. Army Corps of Engineers' Final Regulations, effective January 12, 1987, provided, in relevant part:

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

. . .

51 Fed. Reg., No. 219, 41217 (1986) (Preamble to Regulations codified at 33 C.F.R. Parts 320-330 (1987))

33 C.F.R. 326.3 (1987)

(b) *Initial investigation.* District engineers should take steps to investigate suspected violations in a

timely manner. The scheduling of investigations will reflect the nature and location of the suspected violations, the anticipated impacts, and the most effective use of inspection resources available to the district engineer These investigations should confirm whether a violation exists, and if so, will identify the extent of the violation and the parties responsible.

(c) *Formal notifications to parties responsible for violations.* Once the district engineer has determined that a violation exists, he should take appropriate steps to notify the responsible parties.

. . .

33 C.F.R. 328.3 (1987)

§ 328.3 **Definitions.**

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar means.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

The Environmental Protection Agency's Regulations, effective December 4, 1980, provides in relevant part:

§ 230.3 Definitions

For purposes of this part, the following terms shall have the meanings indicated:

(a) The term "Act" means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92-500, as amended by Pub. L. 95-217, 33 U.S.C. 1251, *et seq.*

(b) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

. . .

(n) The term "permitting authority" means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program approved by EPA under section 404(g) and section 404(h) or his delegated representative.

. . .

(s) The term "waters of the United States" means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams),

mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(t) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
40 CF.R. § 230.3 (1988)

(3)

No. 91-1422

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

S. PAUL HOBBS, and DONNA M. HOBBS, his wife and PHILLIP RAY HOBBS, and DOROTHY V. HOBBS, his wife,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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IN THE

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

With the written consent of all parties given and filed with the Clerk of the Court, the American Farm Bureau Federation respectfully submits this brief as *amicus curiae.*

Amicus curiae, the American Farm Bureau Federation, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

INTEREST OF *AMICUS CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF has its principal offices in Park Ridge, Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico, representing more than 3.8 million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States.

The preservation of private property rights and the ability to farm are of paramount importance to American farmers and ranchers. Farmers and ranchers are inceasingly becoming subject to restrictive regulations at the local, state, and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether. The protection of "wetlands" is today one of the most serious threats to private property rights and agricultural production.

The American Farm Bureau and its farm and ranch member families have a vital interest in the outcome of this case. The Court of Appeals has stretched the reach of the Clean Water Act from "waters of the United States" to virtually "all lands of the United States." What was conceived as an anti-water pollution statute has been stretched into a national "land-use zoning act." Private property owners, especially farmers and ranchers who own the bulk of the "wetlands" in this country, are in desperate need for this Court's clarification of what are jurisdictional "adjacent wetlands," and to answer the question of the authority of the federal government to regulate "non-adjacent wetlands."

STATEMENT OF THE CASE

The case is as stated by the Petitioner.

REASONS FOR GRANTING THE WRIT

I. THE ENVIRONMENTAL PROTECTION AGENCY DOES NOT HAVE INDEPENDENT AUTHORITY TO MAINTAIN AN ENFORCEMENT ACTION WHERE THE CORPS OF ENGINEERS HAS DETERMINED THERE IS NO REQUIREMENT FOR A SECTION 404 PERMIT

The Court of Appeals erred in determining that the Environmental Protection Agency (EPA) has independent authority under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA) to maintain an enforcement action for violation of CWA Section 404 where the Corps of Engineers (Corps), the designated permitting authority under Section 404, has determined there to be no Section 404 jurisdictional waters ("wetlands") and that no Section 404 permit is required.

The Corps has the exclusive authority to determine jurisdiction and the requirement of a permit under Section 404. 33 U.S.C. § 1344(a). The EPA's regulations acknowledge such exclusive Corps' authority. 40 C.F.R. § 230.3(n). The EPA's role in the Section 404 permit program is the development of guidelines in conjunction with the Corps for Corps permit determinations, 33 U.S.C. § 1344(b), and "veto" authority over Corps' decisions to issue a Section 404 permit that have specified impacts, none of which are present in this case. 33 U.S.C. § 1344(c).

The EPA and the Corps resolved the issue of which agency would be responsible for determining "wetlands" jurisdiction. See, *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction of the Section 404 Program and the*

Application of the Exemptions Under Section 404(f) of the Clean Water Act, dated January 19, 1989 (MOA). The MOA makes it clear that the Corps will routinely make original "wetlands" determinations without prior consultation with the EPA, and that Corps determinations in such routine cases will be final and not overruled by the EPA. These provisions of the MOA are consistent with the EPA's actions in *Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers*, 700 F. Supp. 1549, (N.D. Cal. 1988), where EPA withdrew an independently issued violation Findings and Order when it found out that the Corps had previously disclaimed jurisdiction.

A Corps jurisdictional decision not to require a Section 404 permit is discretionary and only subject to review pursuant to the citizen's suit provisions of the CWA, 33 U.S.C. § 1365, and the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.* And, in such cases where the Corps' decision has been deemed deficient, the Court's jurisdiction is limited to remand to the Corps for a proper determination. See, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 902 n.11 (5th Cir. 1983). Similarly, the EPA's CWA authority in cases where it disagrees with a Corps determination disclaiming jurisdiction is to administratively remand such determination to the Corps for a proper determination. EPA cannot, and in practice has not, independently proceed with an enforcement action when it disagrees with a Corps determination of no jurisdictional "wetlands" and thus no requirement for a Section 404 permit.

The Circuit Court's decision creates two separate regulatory authorities with separate enforcement powers under the Section 404 program, resulting in confusion and uncertainty as to compliance with the law. This Court needs to resolve this dilemma.

II. THE COURT OF APPEALS HAS ALLOWED THE UNWARRANTED EXPANSION OF JURISDICTIONAL "WETLANDS" TO INCLUDE MILLIONS OF ACRES OF PROPERTY WHICH ARE NOT "BORDERING" OR "CONTIGUOUS" TO ANY "WATERS OF THE UNITED STATES"

This Court, in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), has thus far determined only "navigable" and "adjacent wetlands" to be jurisdictional "wetlands" under the CWA. By way of a footnote, this Court left open the question of jurisdiction over "wetlands" that are "not adjacent to bodies of open waters." 474 U.S. at 132 n.8. As a result of this open jurisdictional question, the Court of Appeals has allowed the unwarranted expansion of jurisdictional "wetlands" to include millions of acres of private property which are neither "bordering" nor "contiguous" to any "water of the United States," but merely "neighboring" or "in reasonable proximity."

In this case, the Court of Appeals even condoned the District Court permitting a jury of laymen to make a determination of what constitutes a jurisdictional "wetland," allowing them to use three different technical delineation manuals developed for decision making by skilled regulators and which did not even exist until long after the claimed "wetland" violations occurred. Other Circuits have held that the District Court is without power to substitute its own "wetland" determination for that of the agency because of the expertise required to make such a determination. *Avoyelles*, 715 F.2d at 906.

America's farmers and ranchers are in critical need of this Court's clarification of what are jurisdictional "adjacent wetlands," and to draw the line somewhere on the reach of the CWA to "non-adjacent wetlands."

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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(4)

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In the Supreme Court of the United States

OCTOBER TERM, 1991

S. PAUL HOBBS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 309(a) of the Clean Water Act, 33 U.S.C. 1319(a), authorizes the Environmental Protection Agency to bring an enforcement action against persons who discharge pollutants into wetlands without applying to the Corps of Engineers for a permit.

2. Whether the jury correctly determined that petitioners' property was a wetland that was adjacent to waters of the United States for purposes of regulations implementing the Clean Water Act.

3. Whether the regulatory definition of wetlands "adjacent" to waters of the United States is unconstitutionally vague.

4. Whether the district court's refusal to allow petitioners to present evidence that they acted in good faith violated the Fifth or Seventh Amendments.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unreported, but the judgment is noted at 947 F.2d 941 (Table). The opinions of the district court (Pet. App. 16a-20a, 55a-81a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1991. A timely petition for rehearing was denied on December 11, 1991. Pet. App. 95a-96a. The petition for a writ of certiorari was filed on March 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act (the Act) is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). Section 301(a) of the Act, 33 U.S.C. 1311(a), provides that "the discharge of any pollutant by any person shall be unlawful," unless authorized by a permit issued by the Army Corps of Engineers pursuant to Section 404, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The definitional section of the Act, in turn, defines "pollutant" to include any dredged or fill material, Section 502(6), 33 U.S.C. 1362(6), "discharge of a pollutant" to include "any addition of any pollutant to navigable waters," Section 502(12), 33 U.S.C. 1362(12), and "navigable waters" to mean "the waters of the United States," Section 502(7), 33 U.S.C. 1362(7).

Section 101(d) of the Act, 33 U.S.C. 1251(d), grants the Environmental Protection Agency (EPA) general responsibility for administering the Act, "[e]xcept as otherwise expressly provided." Section 309, 33 U.S.C. 1319, specifically authorizes EPA to issue orders requiring compliance with the Act whenever it determines that the Act has been violated, Section 309(a), 33 U.S.C. 1319(a), and to commence civil actions for appropriate relief, Section 309(b), 33 U.S.C. 1319(b). Finally, although Section 404 of the Act gives the Corps of Engineers the authority to issue permits for the discharge of dredged or fill material into covered waters, Section 404(a), 33 U.S.C. 1344(a),[1] it does not condition EPA's enforcement authority over illegal discharges of such materials upon

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[1] Section 404(a) on its face refers to the "Secretary," but Section 404(d) defines the term "Secretary" to mean "the Secretary of the Army, acting through the Chief of Engineers." 33 U.S.C. 1344(d).

prior action by the Corps. See Section 404(n), 33 U.S.C. 1344(n) ("Nothing in this section shall be construed to limit the authority of the Administrator [of EPA] to take action pursuant to section 1319 of this title."); Section 309(a)(3), 33 U.S.C. 1319 (a)(3) (describing EPA's enforcement authority without reference to Corps action regarding a permit).

Both EPA and the Corps[2] have promulgated substantially identical regulations that define "waters of the United States" to include "[w]etlands adjacent to" navigable waters. 40 C.F.R. 230.3(s)(7); 33 C.F.R. 328.3(a)(7).[3] Both agencies' regulations define "adjacent" to mean "bordering, contiguous, or neighboring," and state that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.' " 40 C.F.R. 230.3(b); 33 C.F.R. 328.3(c).

2. Petitioners own 206 acres of land in Gloucester County, Virginia, near the Ware River. Without applying for a permit from the Corps of Engineers, petitioners cleared, drained, and constructed roads on approximately

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[2] Based on EPA's general responsibility for implementing the Act, the Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979).

[3] The term "wetlands" is defined to mean

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

40 C.F.R. 230.3(t); see 33 C.F.R. 328.3(b). The Court upheld the inclusion of wetlands in the definition of "navigable waters" in *Riverside Bayview Homes*, 474 U.S. at 129-139.

50 acres of the land, and in the process discharged dredged or fill material onto the land. In 1988, an official of the Fish and Wildlife Service of the Department of the Interior advised petitioners that they might have discharged fill onto wetlands in violation of the Act. Subsequently, an official of the Corps of Engineers inspected the property, but did not make a determination as to its status as wetlands. Instead, the Corps district office referred the matter to the Regional Office of EPA. On March 23, 1989, EPA issued an administrative order finding that petitioners' activities had violated the Act. Pet. App. 4a-5a, 29a, 97a-99a (jury verdict form); C.A. App. 337-338, 931-938.

3. Petitioners filed this action in the United States District Court for the Eastern District of Virginia, challenging the administrative order. The United States filed a counterclaim on June 23, 1989, charging petitioners with violating Section 301(a) of the Act and with failure to comply with the administrative order. After the court dismissed petitioners' challenge to the administrative order for lack of subject-matter jurisdiction, the case proceeded to trial on the government's counterclaim. After trial, the jury found that petitioners' property was a wetland adjacent to waters of the United States and that petitioners had discharged pollutants onto the wetland. Pet. App. 97a-99a (jury verdict form). After a three-day trial on remedial issues, the district court issued an order (*id.* at 16a-20a) requiring petitioners to allow certain parts of the property to revegetate, conditioning further changes to the property on the issuance of permits, and assessing a total of $300 in civil penalties.

In response to post-trial motions filed by petitioners, the district court issued an opinion (Pet. App. 55a-81a) rejecting petitioners' claims that (1) EPA had no authority to enforce the Act (*id.* at 59a-60a); (2) the regulatory

definition of "adjacent" was void for vagueness (*id.* at 64a-65a); (3) the judge improperly instructed the jury regarding the definition of wetlands (*id.* at 65a-67a); and (4) petitioners should have been allowed to present evidence to the jury regarding their good faith (*id.* at 71a-72a).

4. The court of appeals affirmed (Pet. App. 1a-14a). The court explained that Section 309(a) of the Act plainly authorizes EPA to commence actions challenging discharges of fill into wetlands made without a permit. Pet. App. 7a-8a. It also concluded that the district court properly instructed the jury on the meaning of the term "wetlands," *id.* at 10a-11a, and that the jury's finding that petitioners' property constituted wetlands was not clearly erroneous, *id.* at 11a. It noted that petitioners' contention that the "statute is void for vagueness is without merit." *Ibid.* Finally, it rejected petitioners' contention that due process required the judge to permit petitioners to introduce evidence regarding their good-faith belief that the administrative order was invalid, noting that "good faith is not a defense" to a violation of the Act. *Id.* at 11a-13a.

ARGUMENT

1. Petitioners plainly err in contending (Pet. 10-18) that EPA did not have the authority to commence this action enforcing the Act. As discussed above, Section 101(d) grants EPA general responsibility for administering the Act, and Section 309 expressly grants EPA the power to commence civil actions whenever it determines the Act has been violated. Because Section 301 provides that any discharge of pollutants into wetlands violates the Act if it is made without a permit, and because petitioners admittedly neither sought nor received a permit, this case falls within the core of EPA's enforcement authority under Section 309. The suggestion that the

provisions of Section 404 that grant permitting authority to the Corps of Engineers somehow implicitly deprive EPA of authority to commence actions challenging discharges made without permits is rebutted by the unambiguous language of the statute. See Section 404(n), 33 U.S.C. 1344(n) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section [309].").

There can be no doubt that EPA in the course of administering the Act has authority independent from that of the Corps to determine whether particular lands are wetlands covered by the Act. See, *e.g.*, *National Wildlife Federation* v. *Hanson*, 859 F.2d 313, 316 (4th Cir. 1988) ("The EPA is ultimately responsible for the protection of wetlands."); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 903 n.12 (5th Cir. 1983) (noting that EPA and the Corps signed memorandum acknowledging EPA's independent authority to make wetlands determinations); 33 C.F.R. 325.9(b) (Corps' regulations recognizing EPA's independent authority); 43 Op. Att'y Gen. No. 15, at 6 (Sept. 5, 1979). In any event, contrary to petitioners' suggestions (Pet. 16, 17), it is clear that the Corps in this case never made any determination regarding the status of petitioners' property. As the court of appeals pointed out (Pet. App. 7a-8a), "nothing in the record suggests that the Corps actually refused to exert jurisdiction over the Hobbses [*sic*] property through a wetlands determination." Rather, the record showed that resource limitations induced the Corps district office to refer this matter to EPA without itself making any determination. C.A. App. 337-338, 931-938.

Petitioners' theory (Pet. 9) that the decision below "is in conflict with the decisions of other Circuits" is fanciful. Indeed, this appears to be the first and only reported

decision of a court of appeals addressing a challenge to EPA's independent authority to enforce the Act. The only case cited by petitioners that addresses the issue of EPA's authority specifically recognizes EPA's capacity to make wetlands determinations. See *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 903 n.12. The other case on which petitioners rely (Pet. 12 n.15, 14, 15 n.20), *Orleans Audubon Society* v. *Lee*, 742 F.2d 901 (5th Cir. 1984), stands only for the proposition that a court reviewing a Corps of Engineers determination under Section 404 should not substitute its judgment for that of the agency, a proposition that hardly suggests that EPA is barred from enforcing the Act where the Corps has made no determination. See *id.* at 906-907.[4]

2. Petitioners next contend (Pet. 18-21) that the lower courts erred in determining that petitioners' property constituted wetlands adjacent to waters of the United States. Because the jury found that petitioners' property did constitute wetlands, and because the court of appeals did not overturn that factual finding, this claim does not present an issue meriting this Court's review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985). In any event, the finding was correct. As the court of appeals noted (Pet. App. 11a), expert testimony established that "there was both a ground and surface water connection between [petitioners'] property

[4] Petitioners err (Pet. 10) in stating that the court of appeals held that EPA has authority to issue permits under Section 404 of the Act. EPA's authority with respect to Section 404 permits was not at issue in this case. The court's aside that "EPA would not be much of an authority" if it could "issue permits, but could not enforce the very rule for which those permits provide the exception" (Pet. App. 8a), evidently refers to EPA's unquestioned authority to issue permits under other parts of the Act, such as Sections 318 and 402, 33 U.S.C. 1328, 1342.

and the Ware River." This testimony was sufficient to support the jury's finding.[5]

3. Petitioners also contend (Pet. 21-24) that the regulatory definition of wetlands "adjacent" to navigable waters is unconstitutionally vague. The courts of appeals consistently have rejected vagueness challenges to the regulations defining the scope of the Act. *United States* v. *Tull*, 769 F.2d 182, 186 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 917; see *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). The regulatory definition of wetlands is sufficiently definite to give "a person of ordinary intelligence fair notice" of what conduct the Clean Water Act prohibits, *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Moreover, a landowner can resolve any uncertainty over the existence or extent of wetlands on his property by applying for a permit or by seeking an advisory opinion from the Corps or EPA. See *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 917. Accordingly, this claim does not merit further review.

4. Petitioners' final contention (Pet. 24-30) is that the district court violated the Due Process Clause and the Seventh Amendment by failing to allow petitioners to

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[5] Petitioners err in suggesting (Pet. 18-20) that the jury's determination that their property constituted wetlands conflicts with a statement in the preamble to the Corps' regulation to the effect that the Corps and EPA "generally" decline to assert jurisdiction over "man-made, nontidal drainage ditches dug on dry land." Pet. 18. This policy would not apply in petitioners' case for the simple reason that petitioners' drainage ditches were not excavated on dry land. As the district court noted (Pet. App. 66a-67a), "[petitioners'] own witness, Mr. Rudy Nuttall, a life-long resident of the Ware Neck area, testified that the area was a swamp and that one needed rubber boots when on the [petitioners'] property because the area was extremely wet." See C.A. App. 1366-1367.

introduce evidence tending to establish that petitioners had a good-faith belief in the invalidity of EPA's administrative order, and by failing to instruct the jury that good faith was a defense to enforcement of the order. Because the district court did not impose any penalty for petitioners' failure to comply with the order, this claim does not appear to involve a substantial controversy. See Pet. App. 36a (statement of district court that the $100 penalty assessed against Phillip Hobbs was assessed for his participation in the filling of wetlands contrary to Section 301(a), $200 assessed against Paul Hobbs was based on wetlands destruction, and because some of the filling occurred after he had been put on notice by a Corps official that the property might be wetlands).

In any event, the district court's rulings are correct. First, the courts below properly recognized that good faith is not a defense to liability under the Act, either for filling without a permit or for failure to comply with an administrative order. Pet. App. 12a, 71a. Section 309(d) of the Act creates a strict-liability standard by providing that any person who violates an administrative order "shall be subject to a civil penalty." 33 U.S.C. 1319(d); compare Section 309(c)(1) and (2), 33 U.S.C. 1319(c)(1) and (2) (imposing criminal liability for certain "negligent" and "knowing" violations of the Act). Section 309(d) then specifies that the court, "[i]n determining the amount of a civil penalty[,]" shall consider a list of factors, such as "good-faith efforts to comply * * * and such other matters as justice may require." Thus, Section 309(d) makes a defendant's good faith relevant only to the determination of the amount of civil penalties, not to the threshold assessment of liability. Hence, it does not have to be considered by a jury. See *Tull* v. *United States*, 481 U.S. 412, 425-427 (1987) (civil penalties under the Act need not be determined by a jury). Accordingly, because good faith is not relevant to the issues before the jury, the

Constitution did not require the district court either to allow petitioners to introduce evidence regarding their good faith, or to instruct the jury that good faith was a defense.[6]

Petitioners err in suggesting that the absence of a good-faith defense makes the Act unconstitutional because "the penalties for disobedience are by fines so enormous . . . as to intimidate [an affected party] from resorting to the Courts to test the validity of the legislation." Pet. 27 (quoting *Ex parte Young*, 209 U.S. 123, 147 (1908)). Under Section 309(d), no penalties can be imposed until the violator has had an opportunity to be heard in district court on the merits of the administrative order, under a statutory process that expressly directs the district judge to consider the violator's good faith in assessing the amount of the penalties. See *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, 1121 (2d Cir. 1975) (rejecting challenge to penalty scheme that allowed court to consider good faith of the violator), cert. denied, 426 U.S. 911 (1976); compare *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 334-335 (1920) (invalidating scheme that did not provide for an opportunity to challenge the validity of a statute before enforcement of penalties). Petitioners cite no case finding the Act's procedures to violate due process. These procedures compare favorably with the procedures upheld in *Reisman* v. *Caplin*, 375 U.S. 440, 446-450 (1964) (upholding IRS subpoenas that subjected recipients to fines for noncompliance, because fines would be assessed by a court, which would consider recipients' good faith in

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[6] We note that the district court fully took into account petitioners' contentions of good faith in determining the amount of the civil penalties. See Pet. App. 34a-35a.

refusing to comply).[7] Also, because the district court in fact assessed no penalties on petitioners for their failure to comply with the administrative order, this case is a particularly poor vehicle for evaluation of such a claim. Accordingly, this claim does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Contrary to petitioners' assertion (Pet. 27), *Reisman* v. *Caplin* does not suggest that a defendant is entitled to have a jury consider its good faith. See 375 U.S. at 449 (recipient of subpoena may challenge it "before either the district judge or United States Commissioner").